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EDITOR'S NOTE

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No. 86-787-CSX
Status: GRANTED

Docketed:
November 12, 1986

Title: Cecil Hicks, District Attorney for County of Orange, California, Acting on Behalf of Alta Sue Feiock, Petitioner
v.
Phillip William Feiock

Court: Court of Appeal of California, Fourth Appellate District

Counsel for petitioner: Capizzi,Michael R.

Counsel for respondent: Schwartzberg,Richard Lynn

Entry	Date	Note	Proceedings and Orders
2	Oct 15 1986		Application for stay filed (A-288) and temporarily granted by O'Connor, J. on October 16, 1986.
3	Oct 15 1986		Response filed to Application for stay filed (A-288) on October 22, 1986. Reply filed on October 22, 1986.
4	Oct 15 1986		Application for stay (A-288) granted by O'Connor, J., onOctober 23, 1986.
1	Nov 12 1986	G	Petition for writ of certiorari filed.
5	Dec 17 1986		DISTRIBUTED. January 9, 1987
6	Jan 6 1987	F	Response requested -- [JUS].
8	Feb 2 1987	X	Brief of respondent Phillip William Feiock in opposition filed.
9	Feb 2 1987	N	Motion of respondent for leave to proceed in forma pauperis filed.
7	Feb 18 1987		REDISTRIBUTED. March 6, 1987
10	Feb 18 1987		IFP affidavit in route.
11	Mar 9 1987		Petition GRANTED.
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12	Apr 2 1987		Record filed.
14	Apr 20 1987		Order extending time to file brief of petitioner on the merits until May 14, 1987.
15	May 11 1987		Brief amicus curiae of California filed.
16	May 14 1987	G	Motion of Women's Legal Defense Fund, et al. for leave to file a brief as amici curiae filed.
17	May 14 1987		Brief amicus curiae of United States filed.
18	May 14 1987		Joint appendix filed.
19	May 14 1987		Brief of petitioner Cecil Hicks, etc. filed.
20	May 26 1987		Motion of Women's Legal Defense Fund, et al. for leave to file a brief as amici curiae GRANTED.
22	Jun 8 1987		Order extending time to file brief of respondent on the merits until July 20, 1987.
23	Jul 11 1987		Brief of respondent Phillip William Feiock filed.
24	Jul 17 1987		CIRCULATED.
25	Oct 9 1987		SET FOR ARGUMENT. Tuesday, December 1, 1987. (2nd case)
26	Nov 20 1987	X	Reply brief of petitioner Cecil Hicks, etc. filed.
27	Dec 1 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-787 (1)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR THE COUNTY OF ORANGE, CALIFORNIA, ON BEHALF OF ALTA SUE FEIOCK,
Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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QUESTIONS PRESENTED

1. WHETHER A VALID COURT ORDER FINDING THAT A PARENT HAS THE ABILITY TO SUPPORT HIS MINOR CHILD(REN) MAY, IN A CIVIL CONTEMPT PROCEEDING, CONSTITUTIONALLY JUSTIFY APPLICATION OF A REBUTTABLE STATUTORY PRESUMPTION THAT HIS SUBSEQUENT FAILURE TO DO SO IS WILLFUL, THUS REQUIRING THE CITEE TO CARRY A BURDEN OF PRODUCTION AS TO HIS INABILITY TO COMPLY WITH THE PRIOR ORDER FOR SUPPORT.

2. WHETHER CALIFORNIA COURTS MAY DISREGARD AND REFUSE TO FOLLOW THIS COURT'S LINE OF CASES DEALING WITH CIVIL CONTEMPTS, INCLUDING *UNITED STATES V. RYLANDER* [*460 U.S. 752*], THUS DEPRIVING CUSTODIAL PARENTS, WHOSE NONCUSTODIAL COUNTERPARTS ARE SELF-EMPLOYED AND "EXECUTION PROOF," OF THEIR CIVIL CONTEMPT REMEDY AND EVISCERATING THE STATE'S ABILITY TO ENFORCE CHILD SUPPORT OBLIGATIONS.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR THE COUNTY OF ORANGE, CALIFORNIA, ON BEHALF OF ALTA SUE FEIOCK,
Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

Petitioner, Cecil Hicks, District Attorney for the County of Orange, State of California, acting on behalf of Alta Sue Feiock as required by California *Code of Civil Procedure*, section 1680, hereby respectfully petitions this Honorable Court to issue a Writ of Certiorari to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three in this case. The court below held California *Code of Civil Procedure*, section 1209.5 unconstitutional on the ground that the statute, which specifies the facts that, if proven, establish a prima facie civil contempt of court for failure to pay child support, creates a "mandatory presumption" within the meaning of *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), depriving contemnors of due process.

OPINIONS BELOW

The opinion of the California Court of Appeal (Appendix A) is published as *In re Feiock* and reported at 180 Cal.App.3d 649, 225 Cal.Rptr. 748 (1986). A copy of the Order of the California Supreme Court denying Petitioner's Petition For Review is attached (Appendix B).

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, was entered on April 30, 1986. A timely Petition for Review was denied by the California Supreme Court on August 14, 1986.

Where the highest state court has jurisdiction to review a decision of a lower state court but refuses to do so, the time for petitioning for a Writ of Certiorari runs from the date of the refusal to review. *American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923). This Petition, filed pursuant to 28 U.S.C. section 2101(c) within 90 days of the August 14, 1986 Order denying review, is timely. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, California Code of Civil Procedure, sections 1209.5 and 1672, 45 C.F.R. section 303.6, and California Civil Code, sections 196, 206, and 4700(a). These are set forth in pertinent part in Appendix C, *infra*.

STATEMENT OF THE CASE

On January 19, 1976, an Interlocutory Judgment of Dissolution of Marriage was granted in the Superior Court of the State of California for the County of Orange in case number D85428, in the marriage between Alta Sue Feiock and Phillip William Feiock. Under said Dissolution Judgment, Mr. Feiock was ordered to pay a total of $225.00 per month as and for child support for his three children.

Subsequent to the entry of Dissolution Judgment, Mrs. Feiock and her three children moved to the State of Ohio. When, after a period of time, Mr. Feiock failed to make any of the payments due for child support, Mrs. Feiock sought assistance in the enforcement of her child support orders from her local prosecuting state agency. Upon receipt of Mrs. Feiock's request for assistance, the Ohio prosecuting agency transmitted a Petition under the Uniform Reciprocal Enforcement of Support Act (hereinafter URESA) to the District Attorney, County of Orange, State of California, represented by your Petitioner.

After having been duly cited into court, on June 22, 1984, Phillip William Feiock appeared at the URESA hearing in the Orange County Superior Court. After an extensive hearing, the Court ordered Mr. Feiock to start making his child support payments to the Orange County District Attorney, Family Support Division, and granted Mr. Feiock a temporary reduction in the current amount due.

Between June 22, 1984 and July 31, 1985, Mr. Feiock made only two monthly payments on his child support order. Because Mr. Feiock was self-employed and did not maintain bank accounts or other assets concerning which subpoenas could be served or upon which execution could be levied, your Petitioner filed an Order to Show Cause and Declaration For Civil Contempt against Mr. Feiock as permitted by California *Code of Civil Procedure* sections 1672 and 1209.5.

On August 9, 1985, hearing was held on the Order to Show Cause in Department 43 of the Superior Court of the State of California for the County of Orange, Honorable Donald A. McCartin, Judge presiding. At the hearing, your Petitioner proved the existence of a valid court order directing Mr. Feiock to pay child support, Mr. Feiock's knowledge of the order, and his failure to comply with the Order. Having established these three facts, proof of which, according to *Code of Civil Procedure* section 1209.5 constitutes a prima facie civil contempt of court, Petitioner rested.

After the presentation of Petitioner's case, Mr. Feiock's counsel moved the court for a nonsuit, arguing that *Code of Civil Procedure* section 1209.5 is unconstitutional in that

> "it shifts the element—it presumes or instructs this court to presume an ability to comply with the order if the other elements are shown by adequate evidence. And inasmuch as the procedural protections of a criminal case pertain here as well as they would in say a receiving stolen property case, I don't think the People [sic] can rely on 1209.5." (R.T. 22:6-13.)[1]

> "[I]f 1209.5 is good law, ***I think that counsel has made out a prima facie case*** . . . [emphasis added]. However, I don't think that C.C.P. Section 1209.5 is valid law any more, and my basis for saying that is the case of *People v. Roder* . . . [There,] the Supreme Court said that [in] any criminal prosecution, the prosecution [can] not rely upon a presumption such as that which shifts to the defendant the burden of raising the reasonable doubt or, in a similar fashion, shifts the burden to the defense on an ultimate element of the offense. And that's the reason why I would submit 1209.5 [is] no longer valid law." (R.T. 21:9-22:6.)

[1]The designation "R.T." refers to the Reporter's Transcript of the August 9, 1985 civil contempt hearing.

The trial court responded,

> "I will rely on it, Mr. Licker, and assume it's still good law until the appellate court adopts your argument.
>
> As far as I know, I have always gone by 1209.5, the knowledge shifting the burden over to the defendant to go forward. Presume that the defendant has the ability with regard to dealing with the child support orders, that's, as I said, come down through the ages. So if they want to overrule it, they may, but I will assume it's still good law in spite of your analysis on the *Roder* matter. And you may proceed." (R.T. 22:14-25.)

Respondent's counsel queried, "I take it the motion is denied?" And the court replied, "Yes, Sir." (R.T. 22:26-23:1.)

Mr. Feiock then chose to testify and defend on the theory that he did not have an ability to pay his child support during the months in question. However, after hearing from Mr. Feiock's own mouth that he had earned income and that, in direct violation of California *Civil Code* section 4700(a), he had made payment on debts owed to creditors while neglecting the court's child support order, the trial court found that he was consequently, in civil contempt of court. Feiock was sentenced to a 25-day suspended sentence, placed on three years informal probation, and ordered to begin making his child support payments or to prepare himself for incarceration.

Four months after Mr. Feiock was held in civil contempt, on December 4, 1985, his counsel filed a Petition for Writ of Habeas Corpus in the California Court of Appeal, Fourth Appellate District, Division Three, insisting that the judgment be reversed for the reason that his motion for nonsuit at the August 9, 1985 hearing was improperly denied by the trial court. Mr. Feiock contended that in violation of the

Fourteenth Amendment, *Code of Civil Procedure* section 1209.5 creates an impermissible "mandatory presumption" as defined by this Honorable Court in *Ulster County Court v. Allen, supra, Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Connecticut v. Johnson*, 460 U.S. 73 (1983), and by the California Supreme Court in *People v. Roder*, 33 Cal.3d 491 (1983), a criminal case tried by jury, in which the California Supreme Court based its reversal of a receiving stolen property conviction *solely* upon the doctrine set forth in *Ulster County Court v. Allen* concerning the use of presumptions in *criminal* cases.

In his "Traverse To Order To Show Cause" filed in the Court of Appeal, Respondent also argued that,

> "[a]lthough the law is clear a contemner has both a Fifth Amendment right to silence and a right not to be called as a witness . . . the presumption operative in Code of Civil Procedure section 1209.5 will effectively compel the party paying child support to testify to the inability to comply with the court's order once the conditions precedent to Code of Civil Procedure section 1209.5 have been presented. [Footnote omitted.] There is no other alternative open to a contemner." (traverse filed by Respondent Feiock in the Court of Appeal on or about March 3, 1986, page 13, lines 17-24 through page 14, line 1.)

On January 9, 1986, the Court of Appeal issued an Order to Show Cause to Petitioner herein, ordering the District Attorney to appear and explain why the judgment of contempt should not be set aside. Oral argument was held in the Court of Appeal on April 22, 1986. Thereafter, on April 30, 1986, the Court of Appeal issued a Writ of Habeas Corpus and annulled the August 9, 1985 judgment finding Mr. Feiock in contempt of court. In its novel published opinion, which contradicts all other California cases on the subject since the 1800's, based *solely* on the *Ulster County Court v. Allen* line of criminal cases,

the Court of Appeal held that *Code of Civil Procedure* section 1209.5 is unconstitutional because it creates a "mandatory presumption" which relieves the prosecution of proving all of the elements of the civil contempt "offense."[2]

On June 9, 1986, your Petitioner filed a timely Petition For Review in the California Supreme Court; however, the Petition For Review was denied on August 14, 1986, with Justice Malcolm M. Lucas dissenting. (Appendix B.) Remittitur was issued by the clerk of the Court of Appeal on August 26, 1986, and Petitioner's motion to recall the remittitur was denied by the Court of Appeal on October 6, 1986. On or about October 15, 1986, Petitioner filed an Application For Stay of Enforcement of Judgment with the clerk of this Court which was referred to Justice O'Connor and designated number A-288. A temporary Stay and recall of the remittitur was granted on October 16, 1986, and, on October 23, 1986, the Stay was extended pending the disposition of the case by this Honorable Court.

REASONS WHY THE PETITION SHOULD BE GRANTED

In *In re Feiock*, 180 Cal.App.3d 649 (1986), the California Court of Appeal has used United States Supreme Court precedent concerning a *criminal* defendant's due process rights

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[2]The Court of Appeal opinion (Appendix A) misstates the record to the effect that "Feiock's motion for judgment of acquittal under Penal Code section 1118 was denied . . . " *In re Feiock*, 180 Ca.App.3d at 652 (1986). While referring to Respondent's motion as one for acquittal of criminal charges under the California *Penal Code* fits neatly into the Court of Appeal's schematic mutating this civil contempt action into a criminal case, neither the *Penal Code* nor a "judgment of acquittal" was ever mentioned by anyone in the trial court or in the Court of Appeal, either in the briefs or at oral argument. The record, which was lodged with the Court of Appeal, clearly shows that Respondent moved the trial court for a *nonsuit* which, procedurally, is the proper motion in a *civil* action such as this one. (R.T. 21:6-22:13.)

under the Fourteenth Amendment to invalidate a California *civil* procedure designed to facilitate enforcement of child support obligations.[3] In so doing, it has completely disregarded other United States Supreme Court precedent directly on point, including *United States v. Rylander*, 460 U.S. 752 (1983), which distinguishes civil contempts of court such as the one at issue in this case from criminal proceedings. (Rule 17(c) of the Supreme Court of the United States.)

To reach its unprecendented result, the Court of Appeal ignored the fact that, in conformity with federal due process requirements, California case law historically and contemporaneously differentiates between civil and criminal contempts by looking to the primary purpose for which sentence is imposed (see e.g., *Morelli v. Superior Court*, 1 Cal.3d 328, 333, 361 P.2d 655, 82 Cal.Rptr. 375 (1969), and *People v. Derner*, 182 Cal.App.3d 588, 592 (1986)). The Court below has failed in this case to distinguish, as the California legislature has distinguished, between the California *Penal Code* section 270 crime of nonsupport and a civil contempt proceeding.

Instead, it invented a new crime: civil contempt. It created a new element for that "crime" out of what had formerly been an ***affirmative defense***—requiring the moving party to prove beyond a reasonable doubt that the citee had an ability to pay during each and every month for which he is cited for

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[3]The Court of Appeal relied both on *Ulster County Court v. Allen*, 442 U.S. 140 (1979) and *People v. Roder*, 33 Cal.3d 491, 658 P.2d 1302, 189 Cal.Rptr. 501 (1983). *Roder*, however, was *wholly* based upon *Ulster County Court v. Allen*, and the California Supreme Court stated no independent ground for its decision. Cf. *California v. Beheler*, 463 U.S. 1121, 1123, footnote 1,103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983): "Beheler suggests that the decision below rested upon adequate and independent state grounds in that the court applied state 'in custody' standards . . . It is clear from the face of the opinion, however, that the opinion below rested exclusively on the court's 'decision on the *Miranda* issue' . . . Although the court relied in part on *People v. Herdan*, 42 Cal.App.3d 300, 116 Cal.Rptr. 641 (1974), that decision applied *Miranda*." Similarly, *Roder* applies *Ulster*.

contempt—and then it invoked *Ulster County Court v. Allen* [442 U.S. 140] to bless its creation. 180 Cal.App3d at 653. But the Court of Appeal has conjured up a demon that defies blessing. And that ominous specter now hovers over a wall of required proof that no mother striving to enforce her right to child support against a self-employed, secretive and "execution-proof" father in a civil contempt proceeding can hope to overcome.

In *Feiock*, the California Court of Appeal was presented with the question of whether a valid court order finding that a parent has the ability to support his minor child(ren) may constitutionally support the presumption that his subsequent failure to do so is willful, as provided by the California legislature in *Code of Civil Procedure* section 1209.5. Until *In re Feiock* was published, it was firmly established that such a presumption was constitutional. However, in *Feiock*, the California Court of Appeal held that the presumption in section 1209.5 "is unconstitutional because it is a mandatory presumption which shifts the burden of proof to the defendant, requiring him to prove his innocence." 180 Cal.App.3d 649, 652.[4]

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[4]Recognizing its duty to try to uphold the constitutionality of section 1209.5 [180 Cal.App.3d at 652], the Court below attempted to adopt the *Roder* court's resolution of the problem, holding that "Code of Civil Procedure section 1209.5 should be construed as allowing a permissive inference." 180 Cal.App.3d at 656. Then, the Court of Appeal went so far as to admit that after a support order is made, "*the inference* [of continued ability] *is compelling* for some period of time following the court's order and initial determination of ability to pay." 180 Cal.App.3d at 654. (Emphasis added.) It provided no guidance as to just how long that "compelling inference" might exist.

In *this* case, however, the initial order was made on June 22, 1984, with payments to commence on July 1, 1984. The contempt period included October, November and December of 1984. Had the Court of Appeal applied its own reasoning to the facts of *Feiock*, those three counts should have been sustained even on the basis of a "permissive inference." Obviously, if the Court of Appeal does not consider the nexus between the initial order and the failure to pay three months later sufficiently close to apply the so-called permissive

In attempting to rationalize its ruling, which it acknowledged would have dramatic impact [180 Cal.App.3d at 652], the Court of Appeal offered the adynamic suggestion that, in the future, the moving party might carry its burden of proving the citee's ability to pay by subpoenaing the citee's employment records. 180 Cal.App.3d at 656, footnote 2. But where the citee is self-employed, as in this case, what records can be subpoenaed? And even if such records are maintained and are subject to production under *United States v. Doe*, 465 U.S. 605,104 S.Ct. 1237, 79 L.Ed.2d 552 (1984), how likely is it that the citee will admit their existence, much less produce them? Where the parent works only on a cash basis, avoids reporting income, shuns financial institutions, and disregards court orders, as in this case, what proof can the custodial parent supply? Unfortunately, such parents cannot manufacture evidence as easily as the Court of Appeal can change the rules of the game.[5]

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inference, it is difficult to imagine under what circumstances the permissive inference will *ever* be drawn.

[5]The Court of Appeal acknowledged the conflict created by its decision but opined that contrary case law on the very point at issue was "unpersuasive." 180 Cal.App.3d at 657. Among the unpersuasive cases that the Court of Appeal is prepared to dismiss out of hand is the following sample which represents holdings of other state's highest courts, each in direct conflict with *In re Feiock*: *Lawler v. Ray*, 451 So.2d 348, 349 (Ala. 1984); *Johansen v. State*, 491 P.2d 759, 766 (Alaska 1971); *East v. East*, 229 S.W. 5, 6 (Ark. 1921); *Leslie v. Leslie*, 174 Conn. 399, 401, 389 A.2d 747, 749 (1978); *Lane v. Lane*, 27 App.D.C. 171, 172 (1906); *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985); *Parr v. Parr*, 259 S.E.2d 432 (Ga. 1979); *Application of Martin*, 279 P.2d 873, 876, 878 (Idaho 1955); *In re Marriage of Logsoton*, 103 Ill.2d 266, 469 N.E.2d 167, 175-176 (1984); *Linton v. Linton*, 336 N.E.2d 687, 695 (Ind. 1975); *Skinner v. Ruigh*, 351 N.W.2d 182 (Iowa 1984); *Brayfield v. Brayfield*, 264 P.2d 1064, 1068 (Kan. 1953); *Terrell v. Terrell*, 239 S.W.2d 975, 977 (Ky. 1951); *Lafleur v. Lafleur*, 490 So.2d 1145, 1147 (La. 1986); *Mitchell v. Flynn*, 478 A.2d 1133, 1135 (Me. 1984); *McDaniel v. McDaniel*, 256 Md. 684, 262 A.2d 52, 57 (1970); *Hopp v. Hopp*, 279 Minn. 170, 156 N.W.2d 212, 216-217 (1968); *Clements v. Young*, 481 So.2d 263, 271 (Miss. 1985); *Blair v. Blair*, 600 S.W.2d 143, 145 (Mo. 1980); *State ex. rel. Houtchens v. District Court*, 199 P.2d 272, 274 (Mont. 1948); *McCormick v. Sixth Judicial Dist. Court*, 67 Nev. 318, 218 P.2d 939, 942-943 (1950); *Bond v. Bond*, 83 A.2d 794, 795 (N.J. 1951); *Nelson v. Nelson*, 481 P.2d 403, 406 (N.M. 1971); *In re Hildreth*, 28 A.D.2d 290, 284 N.Y.S. 2d 755, 760 (1967); *Hodous v. Hodous*, 76 N.D. 392, 36 N.W.2d 554, 559-560 (1949); *Rossen v. Rossen*, 208 N.E.2d 764, 767 (Ohio 1964); *Johnson v. Johnson*, 319 P.2d 1107, 1108 (Okl. 1957); *Svehaug v. Svehaug*, 517 P.2d 1073, 1075 (Or. 1974); *Barrett v. Barrett*, 470 Pa. 253, 263, 368 A.2d 621 (1977); *Thomerson v. Thomerson*, 387 N.W.2d 509, 513 (S.D. 1986); *Leonard v. Leonard*, 341 S.W.2d 740, 743-744 (Tenn. 1960); *Ex Parte Padfield*, 276 S.W.2d 247, 251 (Tx. 1955); *Coleman v. Coleman*, 664 P.2d 1155, 1157 (Utah 1983); *Branch v. Branch*, 132 S.E. 303, 305 (Va. 1926); *Spabile v. Hunt*, 134 Vt. 332, 360 A.2d 51, 52 (1976); *State v. Mecca Twin Theater and Film Exchange, Inc.*, 82 Wash.2d 87, 507 P.2d 1165, 1168 (1973); *Floyd v. Watson*, 254 S.E.2d 687 (W.Va. 1979); *In re Adams Ribs Inc.*, 39 Wis.2d 741, 159 N.W.2d 643, 647 (1968). (Rule 17(b), Rules of the Supreme Court of the United States.)

In re Feiock is also in conflict with the views expressed in the federal circuits: *Fortin v. Commissioner of Massachusetts Dept. of Public Health*, 692 F.2d 790, 769 (1st Cir. 1982); *In re Marc Rich & Co. A.G.*, 736 F.2d 864, 866 (2nd Cir. 1984); *United States v. Huckaby*, 776 F.2d 564, 567 (5th Cir. 1985); *United States Ex. Rel. Thom. v. Jenkins*, 760 F.2d 736, 739 (7th Cir. 1985); *United States v. Baker*, 721 F.2d 647, 650 (8th Cir. 1983); *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985); *Heinold Hog Market, Inc. v. McCoy*, 700 F.2d 611, 615 (10th Cir. 1983); *United States v. McAnlis*, 721 F. 2d 334, 338 (11th Cir. 1983); *Securities and Exchange Commission v. Ormont Drug & Chemical Co., Inc.*, 739 F.2d 654, 656-657 (D.C. Cir. 1984).

Now that the civil contempt remedy has been mutated into a criminal action by the Court of Appeal's misapplication of *Ulster County Court v. Allen, supra*, the statutory remedy that, in 1955, the California legislature saw fit to provide for forsaken single parents struggling to feed, clothe, and house their children has been eviscerated. And, if this Honorable Court does not act to remedy this travesty of justice and correct the Court of Appeal's misapplication of Supreme Court precedent, the line of this Court's cases including *United States v. Rylander, supra*, will have no force or effect in the State of California. And, in this case, the People of the State of Ohio may, eventually, have to bear the burden of subsidizing Phillip Feiock's neglect of his own offspring.

REASONS WHY THE WRIT SHOULD BE GRANTED

CALIFORNIA'S STATUTORY SCHEME FOR ENFORCING CHILD SUPPORT OBLIGATIONS IS CONSTITUTIONALLY UNOBJECTIONABLE AND NEED NOT BE DISMANTLED

A. CALIFORNIA LAW PRIOR TO THE COURT OF APPEAL DECISION IN *FEIOCK* UNIFORMLY HELD THAT (1) IN A CIVIL CONTEMPT PROCEEDING PROSECUTED UNDER SECTION 1209.5 OF THE *CODE OF CIVIL PROCEDURE* INABILITY TO PAY WAS A MATTER OF AFFIRMATIVE DEFENSE ON WHICH THE CITEE HAD THE BURDEN OF PRODUCING EVIDENCE AND THAT (2) THE PLACEMENT OF SUCH BURDEN WAS CONSTITUTIONAL

Before the Fourth District Court of Appeal's decision in *In re Feiock*, it was a matter of hornbook law in California that inability to pay an order for child support was an affirmative defense to a contempt charge brought under California *Code of Civil Procedure*, section 1209.5, and that "[t]he effect of [*Code of Civil Procedure*, section 1209.5, was] to place the burden of going forward upon the contemnor" as to all his affirmative defenses. It was held that the statute "does not shift the burden of proof to [the contemnor, but that the] latter burden remains with the party prosecuting the order to show cause." *Oliver v. Superior Court*, 197 Cal.App.2d 237, 242, 17 Cal.Rptr. 474 (1961). As one court put it:

> "Section 1209.5 of the Code of Civil Procedure . . . defines no crime at all. The section merely specifies the facts that, if proven, shall constitute prima facie evidence of contempt of a child support order, thus shifting the burden of producing evidence upon the contemnor." *Lyons v. Municipal Court*, 75 Cal.App.3d 829, 838, 142 Cal.Rptr. 449 (1977)

Confronting the *Feiock* court were California decisions dating back to the 1800's holding that inability to comply with a prior court order is an affirmative defense on which a civil contempt citee must carry the burden of production. These cases, which the Court of Appeal handled with ease by refusing to acknowledge their existence, included *Galland v. Galland*, 44 Cal. 475, 478 (1872); *Ex Parte Spencer*, 83 Cal. 460, 465, 23 P.395 (1890); *In re Pillsbury*, 69 Cal.App. 784, 788 (1924); *Bailey v. Superior Court*, 215 Cal. 548, 555 (1932); *Lyon v. Superior Court*, 68 Cal.2d 446, 451, 439 P.2d 1, 67 Cal.Rptr. 265 (1968); *Oliver v. Superior Court, supra*; *Martin v. Superior Court*, 197 Cal.App.3d 412, 95 Cal.Rptr. 110 (1971); and *Lyons v. Municipal Court, supra*.[6]

In *Lyon v. Superior Court, supra*, the California Supreme Court unanimously upheld orders adjudging a defaulting parent in contempt, treating inability to pay not as an element of the moving party's case in chief, but as an *affirmative* defense. As the Court pointed out:

> "We are of the opinion that unless a defendant shows he has complied with the court's order to the

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[6] "It has long been established in California law that a denial of hearing [in the California Supreme Court] is not an expression of the Supreme Court on the merits of the cause. [Citations.] Adoption of the new 'review' procedure [in California, effective May 6, 1985] does not affect this legal doctrine and denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion." *California Rules of Court*, rule 28, Advisory Committee Comment. Thus, denial of review in this case cannot be properly interpreted as a reflection of the California Supreme Court's view of the merits; neither should it be construed as constituting a willingness on the part of that Court to modify its holdings on the issue here involved as set forth in the *Galland*, *Spencer*, *Bailey* and *Lyon* cases.

> fullest extent of his ability his ***defense of inability*** fails. In other words, if this defendant was actually able to pay more than the $50 per month he has been paying, then ***he has failed to show his inability*** to comply with the order." (Emphasis added.) Accord, *In re Lawatch*, 189 Cal.App.2d 646 (1961)

It is, to say the least, difficult to perceive how that defense has somehow been transmogrified into an element of Petitioner's burden of proof. But even assuming *arguendo* the premise of the Court of Appeal that Petitioner had the burden of establishing the negative of inability to pay, it is respectfully submitted that the Court erred in discarding the Legislature's attempt to speak to that question in section 1209.5. That section is constitutionally objectionable.[7]

To the extent that ability to pay a child support order was ever dicussed in terms of being an "element" of contempt, it was uniformly held that proof of ability to pay at the time the order was made was legally sufficient to establish a prima facie contempt of court.

> "[I]nherent in an order for child support is a determination of a present ability to make the

[7]Compare the discussion in *United States v. Fleischman*, 339 U.S. 349, 362-364 (1949); while there the majority was applying a rule concerning the constitutionality of shifting the burden of proof in a criminal case that, following *Ulster County Court v. Allen*, *supra*, no longer pertains in criminal cases, the language does have considerable vitality in the context of a civil contempt such as the one here involved: "In this situation, manifestly, the prosecution is under a serious practical handicap if it must prove the negative proposition—that respondent . . . had no good reason for failing to try to comply with the subpoena insofar as she was able . . . On the other hand, the burden of the affirmative was not an oppressive one for respondent to undertake; the relevant facts are peculiarly within her knowledge. She was called upon merely to introduce evidence as to what steps she took after receiving the subpoena, or, if she took no action, any evidence tending to excuse her omission. [W]e think that under the circumstances here presented the burden was upon her to present evidence to sustain such a defense."

> required payments. It seems reasonable to infer that more likely than not such an ability will continue . . . Furthermore, one ordered to pay such support who for one reason or another finds himself, in whole or in part, unable to do so, is permitted to, and usually does, apply to the court for an appropriate modification of the order. ***From a finding of ability to pay at the time of the order and the failure to seek its modification, inferences may reasonably be drawn that an ability to meet the ordered payments continues, thus establishing the statute's 'prima facie evidence of a contempt.'*** " (Emphasis added.) *Martin v. Superior Court*, 17 Cal.App.3d 412, 415-416, 95 Cal.Rptr. 110 (1971)

The *Martin* case, above, decided in 1971, appears to have been the first published case to rule directly on the constitutionality of *Code of Civil Procedure*, section 1209.5. When, in *Martin*, the statutory scheme was subjected to constitutional attack on Fifth and Fourteenth Amendment grounds, the Court of Appeal, First Appellate District, found no constitutional infirmity in the statute. And until the Court of Appeal decision in *Feiock*, it was settled that the statute was constitutional.

In its opinion, however, the Court of Appeal found *Martin* to be "unpersuasive, mainly because it predated [*People v.*] *Roder*, [33 Cal.3d 491, 658 P.2d 1302, 189 Cal.Rptr. 501] and the United States Supreme Court decisions *Roder* relied on." *In re Feiock*, 180 Cal.App.3d at 654-655. The *Martin* court had relied on *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943), *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed. 57 (1969) and *People v. Stevenson*, 58 Cal.2d 794, 376 P.2d 297, 26 Cal.Rptr. 297 (1962) and, since *Tot* and *Leary*, with which *Stevenson* is in accord, have been expanded and refined since *Martin* was penned, the *Feiock* court's finding as regards the constitutional analysis in *Martin* has some surface credibility to it. But the analysis breaks down if the *Martin*

court's reliance on *Tot* and *Leary* was unnecessary in the first instance. And it was.

Apparently, the Court of Appeal in *Feiock*, without inquiring further, simply assumed that the *Martin* court's reliance on the *Tot* line of cases was correct, and the authoritative language of *Martin* serves only to encourage such an assumption: "[s]ince *Tot*, *Leary* and *Stevenson* ***unquestionably*** state the applicable constitutional principles," the *Martin* court declared, "our immediate task is to determine whether section 1209.5 conforms to the standards there announced." (Emphasis added.) *Martin*, 17 Cal.App.3d at 415, 95 Cal.Rptr. 110. Unfortunately, the *Martin* court reached the right result, but it did so by using the wrong reasons.

When *Martin* was written, eight years before *Ulster County Court v. Allen, supra*, the test for the validity of a presumption in a *criminal* case required only that the presumed fact be "more likely than not to flow from the prove[n] fact on which it is made to depend." *Leary*, 395 U.S. at 36, 89 S.Ct. 1532, 23 L.Ed.2d 57. Petitioners in the *Martin* case contended that section 1209.5 failed to comport with that test, and, as authority, they cited to the court *Tot* and *Leary*. Whether it was because the *Martin* court indiscriminately relied on counsel to cite controlling authority and made no effort on its own to discover whether a different line of United States Supreme Court cases concerned with civil contempts existed, or whether the court simply found it easy to validate section 1209.5 by fitting it to the requirements of *Tot* and *Leary*, the only authority that was called to its attention by counsel, the *Martin* court analyzed the statute's constitutionality by using a test that had been designed to assist juries in dealing with the use of presumptions in *criminal* cases. In doing so, the court erred.

Though it correctly determined that *Code of Civil Procedure*, section 1209.5, is constitutional, the *Martin* court reached that result by way of the wrong test and a faulty analysis which has gone unchallenged and uncorrected for

fifteen years. And now, because the Court of Appeal in *Feiock* has taken it for granted that the *Tot* and *Leary* line of cases applies, the mistake of *Martin* has become the failure of *Feiock*, a failure which threatens the very lives of children throughout the United States.

B. THE LINE OF UNITED STATES SUPREME COURT CASES THAT INCLUDES *ULSTER COUNTY COURT V. ALLEN* DOES NOT APPLY IN A CIVIL CONTEMPT PROCEEDING SUCH AS THE ONE AT BAR; THE REASONING OF *UNITED STATES V. RYLANDER* APPLIES.

Both *Ulster County Court v. Allen, supra* and *People v. Roder, supra* are direct descendants of *Tot v. United States, supra*. *Tot* was the first in a line of this Court's cases to articulate a due process test by which presumptions in *criminal* cases are to be evaluated. That line of cases includes *United States v. Gainey*, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965), *United States v. Romano*, 382 U.S. 135, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965), *Leary v. United States, supra*, *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970), *Barnes v. United States*, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), *Ulster County Court v. Allen*, above, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), and *Francis v. Franklin*, 471 U.S.____, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

All of the cases in the *Tot* line are *criminal* cases in which presumptions concerning criminal intent and problematic *jury* instructions are involved. Although a civil contempt proceeding has sometimes been referred to as "quasi-criminal" in nature because of the potential consequences that a judgment of contempt can have (*Oliver v. Superior Court*, 197 Cal.App.2d 239-240, 17 Cal.Rptr. 474 (1961)), the better analysis seems to

be that adopted by California appellate courts, in reliance upon this Court's distinction between criminal and civil contempts. This approach is exemplified by *People v. Derner*, 182 Cal.App.3d 588, 227 Cal.Rptr. 344 (1986).[8]

In *Derner*, defendant wrongfully concealed his four-year-old daughter from her mother for over four years by taking her out of the state. When he and his daughter were returned to California, he was held in contempt for violating the court order awarding the wife custody and was subsequently charged with a criminal violation of *Penal Code* section 278.5. The argument that the contempt order prohibited a section 278.5 prosecution because of double jeopardy was rejected by the Court of Appeal, which explained:

> "Thus, in *Shillitani v. United States* (1966) 384 U.S. 364, 379 [16 L.Ed.2d 622, 627, 86 S.Ct. 1531], the United States Supreme Court set forth the following test: '[W]hat does the court primarily seek to accomplish by imposing sentence?' If the purpose of the sentence is to vindicate the dignity or the authority of the court, then the proceeding is criminal. (*People v. Lombardo*, (1975) 50 Cal.App.3d 849, 852 [123 Cal.Rptr. 755]; 7 Witkin, Cal.Procedure (3rd. ed. 1985) Trial, Section 176, pp.172-173.) If, on the other hand, the sentence is intended to protect and enforce the right of private parties by compelling obedience to court orders and decrees, then the proceeding is said to be civil. (*Morelli v. Superior Court* (1969) 1 Cal.3d 328, 333 [82 Cal.Rptr. 375, 461 P.2d 655]; *People v. Lombardo*, *supra*, 50 Cal.App.3d at pp.852-853; 7 Witkin, *supra* section 175, p. 172.) In other words criminal contempt ***punishes*** whereas civil contempt ***coerces***."

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[8]Defendant Derner's July 22, 1986 Petition for Review by the California Supreme Court was denied on September 25, 1986.

People v. Derner, 182 Cal.App.3d 588, 592, 227 Cal.Rptr. 344 (1986)

Under this analysis, the contempt proceeding in the instant matter was indubitably ***civil*** in nature. Its object was, obviously, to ***coerce*** the payment of child support rather than to punish. Thus, the California Court of Appeal's reliance upon the *Ulster* line of criminal cases is erroneous. That line of cases cannot serve as authority for an analytical framework dealing with civil contempt citations such as the one at issue here. This Honorable Court has developed a ***completely separate*** mode of analysis to deal with civil contempts, excluding them from the application of the *Ulster* line of cases. *United States v. Rylander*, represents that line of cases dealing with contempts such as ours.

In *United States v. Rylander, supra*, a case decided nearly four years after *Ulster* and two months after California's *People v. Roder, supra*, this Court reviewed the plight of Richard Rylander. Rylander, who was the President of Rylander and Co. Realtors, was served with a summons pursuant to 26 U.S.C. section 7602, ordering him to appear before an agent of the Internal Revenue Service and to produce for examination, and testify with respect to, books and records of two of his corporations. When Rylander failed to comply with the summons, the United States District Court issued an enforcement order. ***Rylander neither sought reconsideration of the enforcement order, nor did he appeal from it.*** He finally appeared before the IRS agent; however, he failed to produce the required records. As a consequence, the District Court issued an order to show cause why Rylander should not be held in contempt of court.

When, at the hearing, Rylander invoked the Fifth Amendment privilege against compulsory self-incrimination and ***refused to present any*** other competent evidence in support of his claim that he did not possess the records in question, the District Court held Rylander in contempt. In so doing, the District Court utilized a presumption: after

affirmatively finding that Rylander was in fact the president of the two involved corporations, and that, thus, he had constructive possession and control over the corporations' books and records, the court presumed that Rylander had it within his present ability to produce the required documents. The District Court further held that Rylander had the ***burden of producing evidence*** with respect to his inability to comply with the court order. And, since Rylander refused to shoulder the burden of producing ***any*** evidence, the District Court inferred that Rylander's disobedience to the subpoena was willful and contemptuous. Rylander was, thus, "faced with a *civil* contempt order directing him to either ***produce*** the subpoenaed records ***or face imprisonment.***" (Emphasis added.) *Rylander*, 460 U.S. at 755, 103 S.Ct. 1548, 75 L.Ed.2d at 526-527.

The Court of Appeals for the Ninth Circuit reversed. It "emphasized that the enforcement proceeding was summary in nature, that the Government's burden was light, and that there had been no express finding in the [initial] enforcement proceeding that Rylander was [actually] in possession or control of the records." *United States v. Rylander, supra*, 460 U.S. at 756. Thus it held that Rylander's invocation of the privilege against compulsory self-incrimination required that the *Government* go forward with evidence ***to prove*** Rylander's present ability to comply with the court order to produce documents. In response to this reasoning, which strikes Petitioner as sounding familiar, this Court granted certiorari and reversed the Court of Appeals.

This Court, in an eight to one decision, held, first of all, that for the purpose of a finding of contempt, Rylander's ability to comply with the order for production had been sufficiently established by the initial District Court enforcement order from which Rylander had not appealed. Second, the Court found ***no fault***, constitutional or otherwise, in the District Court's use of the rebuttable presumption of continuing possession, and finally, the majority agreed with the District

Court that inability to comply with the initial order was a matter of affirmative defense concerning which Rylander had the burden of producing evidence. As the Court reasoned:

> "Rylander . . . was held in contempt for failure to comply with a previous order of the District Court enforcing an IRS summons against him. ***This order, unappealed from, necessarily contained an implied finding*** that no defense of lack of possession or control had been raised and sustained in the proceedings. The only issue open to Rylander in ***defending the contempt*** proceeding ***was to show inability to then produce,*** and because of the ***presumption of continuing possession arising from the enforcement order, Maggio v. Zeitz,*** (1948) 333 U.S. 56, 92 L.Ed. 476, 68 S.Ct. 401, ***if he sought to defend on that ground he was required to come forward with evidence in support of it.*** The fact that his refusal to come forward with such evidence was accompanied by a claim of Fifth Amendment privilege may be an adequate reason for the Court's not compelling him to respond to cross-examination at the contempt hearing [footnote omitted], but the claim of privilege is not a substitute for relevant evidence [that would assist in meeting a burden of production]." *United States v. Rylander*, 460 U.S. 752, 760-761 [758], 103 S.Ct. 1548, 75 L.Ed.2d 521, 530-531 [529] (1983)

The scenario in *Rylander* is strikingly similar to that of *Feiock* and to that which occurs in child support contempt proceedings daily throughout our nation. In each case, there is an initial order in which there is a finding of ability to pay. In each case, one who disagrees with the court's findings can appeal and, in a child support case, can also move the court for a modification at any time based upon a change of circumstance, the significance of which was emphasized by the *Martin* court. In each case, failure to appeal or to seek

modification of the initial order raises a rebuttable presumption of continued ability to comply with the order. And in each case, when an order to show cause re contempt is adjudicated, inability to comply can be raised as an affirmative defense. Finally, in each case, if a citee refuses to go forward with the evidence concerning his defenses, he may constitutionally be imprisoned for contempt of court. *Rylander* is, thus, instructive as regards both the propriety and the constitutionality of shifting the burden of production to the contemnor herein.

Of course, in view of the fact that Rylander was faced with imprisonment, this Court *could* have ignored or blurred the distinctions of precedent and decided to describe "ability to comply" with the court order as an element of a crime that the "prosecution" [9] must prove beyond a reasonable doubt[10] while the Rylanders and Feiocks of this world "sit on their hands"[11]

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[9]Often, the "prosecution" is not the District Attorney but an indigent single parent acting in propria persona who would not be in court without counsel if she could afford to feed her children without their father's assistance.

[10]After noting the procedural similarity of enforcement proceedings concerned with alimony orders and those dealing with bankruptcy, in which citees must carry burden of production as to evidence of their inability to comply with prior orders of court, Chief Justice Taft wrote for the court in *Oriel v. Russell*, 278 U.S. 358, 365-366, 73 L.Ed.419, 425 (1928), quoting the late circuit Judge McPherson of the third circuit: "[A]s the order to pay . . . stands without sufficient reply, it remains what it has been from the first—and order presumed to be right, and therefore an order that ought to be enforced . . . [T]he court may believe the bankrupt's assertion that he is not now in possession or control of the money . . . but it is also true that the assertion may not be believed; and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be . . . [I]mprisonment for debt has ceased, but imprisonment *to compel obedience to a lawful judicial order* . . . has not yet ceased and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees." (Emphasis added.)

[11]The Court of Appeal opined that, "despite [his] continuing obligation to comply, Feiock 'may literally sit on his hands' and defend any contempt

or snicker up their sleeves. But this Court declined to "convert the privilege [claimed by Rylander] from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Rylander*, 460 U.S. at 758, 103 S.Ct. 1548, 75 L.Ed.2d at 529.[12]

The *Rylander* majority further recalled *Maggio v. Zeitz*, 333 U.S. 56, 69, 68 S.Ct. 401, 92 L.Ed. 476 (1948), wherein it was observed:

> "It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." *United States v. Rylander*, 460 U.S.

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allegation by relying on the prosecution's burden of proof; its burden to affirmatively show, beyond a reasonable doubt, his ability to comply with the order, to wit, his ability to pay." *In re Feiock, supra*, 180 Cal.App.3d at 654. They have affirmed that approach in subsequent cases, leaving repondent's three children, and others like them, to eat cake.

[12]Cf. *People v. Beverly Bail Bonds*, 134 Cal.App.3d 906, 185 Cal.Rptr. 36 (1982) which holds that "[t]he failure of a defendant on bail to appear before the court is presumptively without sufficient excuse," and that the "burden of *rebutting* such presumption rests with the defendant's representatives." *Beverly Bail Bonds*, 134 Cal.App.3d at 911, 185 Cal.Rptr. 36. The court further held that the "presumption against an absconder's disability furthers the public policy of inducing compliance with the requirement that accused criminals appear before the court when ordered . . . Placing on defendants or their agents the burden of producing evidence showing an excused absence is proper because it is more reasonable to require the defendant or his surety to show disability than it would be to require the state to initially present evidence that the absconder was disabled." *Beverly Bail Bonds*, 134 Cal.App.3d at 913, 185 Cal.Rptr. 36.

752, 756-757, 103 S.Ct. 1548, 75 L.Ed.2d 521, 527-528 (1983)

In the context of the *Feiock* case, sadly, by requiring the party prosecuting the contempt essentially to relitigate the issue of ability to comply, the opinion of the Court of Appeal does nothing if not "foster experimentation with disobedience." Where the party seeking the judgment of contempt must prove, beyond a reasonable doubt, the actual income, expenses, ability to work and so forth of a self-employed parent such as Feiock, who apparently avoids financial institutions and the reporting of assets or income to any agency that otherwise might be served with a subpoena, it will be *impossible* to carry the burden of proving ability to comply. Thus, the law, in effect, will operate to encourage the continued secretion of financial information and noncompliance with orders to pay child support.

The number of cases in which such an odious result will be manifested is already approaching the proportions of a plague. And, in such cases, where civil contempt has been the remedy of last resort, as in the case at bar, the remedy will be decimated. What should be of crucial concern, however, is that the line of cases cited by the Court of Appeal in the *Feiock* case which could cause such a result if controlling, does not apply in the context of a civil contempt.[13] If it did apply to the

[13]Were *Ulster* and *Roder* properly applied to a section 1209.5 proceeding, however, and assuming for the sake of argument that the statute does create a "mandatory presumption," *Ulster* and *Roder* both recognize that, within the category of mandatory presumptions, certain presumptions may be constitutionally permissible "[t]o the extent that [they] impose[ ] an extremely low burden of production—e.g. being satisfied by 'any' evidence." *Ulster*, 442 U.S. at 158, fn. 16, 99 S.Ct. at 2225, fn. 16, 60 L.Ed. at 792, fn. 16; *People v. Roder, 33 Cal.3d at 500, fn. 10, 658 P.2d 1302, 189 Cal.Rptr. 501. (Compare footnote 4, supra.)* Moreover, the *Ulster* majority states that if such a permissible "presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the [rational connection] test described in *Leary* [*v. United States, supra*]." *Ulster*, 442 U.S. at 167, 99 S.Ct. at 2230, 60 L.Ed.2d at 798. In the present case, the presumption is not the "sole and sufficient basis" for the finding of contempt. A judgment of contempt using the 1209.5 presumption is rendered only after proof beyond a reasonable doubt that a lawful order based on ability was made, that the contemnor had knowledge of the order, and that the order was not obeyed.

instant action, it would have been applied by this Court in *Rylander*. And it was not. Therefore, in that the rationale of *Rylander* applies to the facts of this case, it is clear that the judgment of contempt herein must be reinstated—and only this Court can accomplish it.

C. IN A CIVIL CONTEMPT PROCEEDING TO ENFORCE AN OBLIGATION TO PAY COURT-ORDERED CHILD SUPPORT, REQUIRING THE CITEE TO CARRY A BURDEN OF PRODUCTION AS TO HIS AFFIRMATIVE DEFENSES IS NOT ONLY CONSTITUTIONAL, IT SERVES TO ADVANCE A COMPELLING STATE INTEREST—ASSURING THAT CHILDREN RECEIVE THE SUPPORT THEY REQUIRE FROM THEIR PARENTS

"Certainly there are few interests of greater importance to the state than the proper discharge by parents of their duties to their children." *Pencovic v. Pencovic*, 45 Cal.2d 97, 103, 287 P.2d 501 (1955). California *Civil Code* sections 196 and 206 declare that parents have a legal (not to mention moral) duty to support and educate their children. And section 4700(a) of the *Civil Code* indicates how important the California legislature deems that duty to be in cases where a court order for support has been made. It provides, "[a]ll payments of support shall be made by the person owing the support payment ***prior to the payment of any debts*** owing to creditors." (Emphasis added.) Furthermore, federal regulations ***require*** that the "IV-D

agency [which, in this case, is the Office of the District Attorney For the County of Orange, Family Support Division] *must* maintain an ***effective*** system . . . to enforce [support] obligation[s] . . . Such attempts to collect support ***must include . . . contempt proceedings to enforce*** an extant court order." 45 C.F.R. section 303.6 (Emphasis added.)

If the Court of Appeal's holding in this case survives it will be impossible for the IV-D agency, with its limited human resources, to carry out the requirements of 45 C.F.R. section 303.6(a) where the obligor is self-employed. There are not enough investigators available to have one sitting in each debtor's driveway. And, of even greater consequence, an order permitting the Court of Appeal's opinion to stand will reduce *Civil Code* sections 196, 206, and 4700(a) to "sounding brass and tinkling cymbal" and turn the court's child support order into a worthless piece of scrap.

In *Rylander*, the majority opinion concludes by commenting on what would have resulted were the Court of Appeals' view to have prevailed there:

> "The Court of Appeals' view of the matter would require still additional hearings on the issue of possession or control of the corporate books or records, with the Government having the burden of production at the reopened contempt hearing. Given the oft-stated reliance of the federal income tax system on self-assessment, ***a plainer guide to the successful frustration of this system could hardly be imagined.***" (Emphasis added.) *United States v. Rylander*, 460 U.S. 752, 762, 103 S.Ct. 1548, 75 L.Ed.2d 521, 531 (1983)

Here, if the Court of Appeal's view is to prevail, the plainest guide to the successful frustration of the above statutory duties concerning the support owed by parents to their children will have been provided. That the Court of Appeal in *Feiock* "recognize[s] the impact [its] decision will have" [180 Cal.App.3d at 652] is of exceedingly little consolation to

Petitioner or to three heretofore forgotten children in Ohio. It is commendable that the court below is willing to "face the music," but this tune—respectfully—should never have been played. It will, in the cases where the civil contempt remedy is most productive and necessary, create an impossible burden of proof for the party prosecuting the contempt. Such a result is unnecessary, unfair, and not constitutionally compelled. It is also frightening.

CONCLUSION

Supreme Court review of the California Court of Appeal's decision in this case reversing the trial court and declaring California *Code of Civil Procedure*, section 1209.5 unconstitutional is required to resolve the conflict in the law created by the Court of Appeal's published opinion, the reasoning, analysis, and holding of which, as demonstrated in this case, represent a constitutionally infirm and empirically ill-advised departure from the law as previously settled not only in the State of California but generally throughout the United States.

The primary effect of *In re Feiock* has been to eliminate civil contempt as an enforcement tool throughout the State of California in the large volume of cases where parents are self-employed. It effectively exempts a class of individuals—those who are self-employed—from application of the law. This denies the ***custodial parent*** due process of law. *Ulster County Court v. Allen* does not compel or countenance such an unjust and ill-advised result.

Since the publication of *In re Feiock*, the Court of Appeal has continued to adhere to and expand its decision. It has now become a statewide issue *see, e.g.*, the California State Bar publication, *California Lawyer*, October, 1986. Further, letters to Petitioner from other States' prosecuting agencies indicate this is now becoming a nationwide issue. The damage to the federally-mandated child support collection system thus will not be confined to the State of California. Unless this Court

corrects the Court of Appeals' error, the Congress' entire child support collection legislation will be jeopardized.

After *In re Feiock*, only this Court remains able to assure that *all* children have an equal and enforceable right to support from their parents in the courts of California. Correct application of the applicable case law, such as *United States v. Rylander, supra*, to the issue of the constitutionality of California *Code of Civil Procedure* section 1209.5 will restore that important right to the young people affected by the jurisdiction of California's courts.

Even if the cases cited by the Court of Appeal in *Feiock* were held to apply, however, those cases permit so-called mandatory presumptions in cases where a defendant's burden of production is "low". Thus, if *Ulster* and *Roder* do apply herein, policy considerations argue strongly in favor of fitting the subject statute into the *Ulster* and *Roder* mandatory presumption exception. After all, it should be more important for courts to encourage parents who *can* pay child support to put their hands in their back pockets where they can do some good than to invite parents to "sit on" them. For this Court to hold otherwise—or to fail to review this critical issue—will be to leave thousands of children with nothing to sit on *but* their hands.

Accordingly, and for all the above-stated reasons, Petitioner prays that this Honorable Court grant the Petition for Certiorari.

Dated this 7th day of November, 1986.

Respectfully submitted,

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APPENDIX A

From California Reporter — [April, 1986]

IN RE FEIOCK

[180 Cal.App.3d 649]

[No. G003512. Fourth Dist., Div. Three, Apr. 30, 1986]

In re PHILLIP WILLIAM FEIOCK on Habeas Corpus.

SUMMARY

A father was ordered to pay child support for his three children as part of a dissolution action, and thereafter the district attorney obtained a support order under the Uniform Reciprocal Enforcement of Support Act. After the father failed to pay the ordered support, the district attorney brought a contempt action, at which the parties stipulated there was a valid court order requiring the payment of support to the district attorney's office, and that the father was present in court when the order was made. Despite the father's attempts to prove his inability to pay the ordered support, the trial judge sustained the majority of the contempt allegations based on the presumption mandated by Code Civ. Proc., § 1209.5 (presumption of contempt based on nonpayment of court-ordered support).

On petition of the father, the Court of Appeal granted a writ of habeas corpus and annulled the judgment of contempt. The court held that § 1209.5 was unconstitutional, since it created a mandatory presumption that shifted the burden of proof to the defendant, requiring him to prove his innocence, and since the

fact of noncompliance with a valid court order did not compel an inference of guilt beyond a reasonable doubt. However, the court held that, as to future cases, § 1209.5 was to be construed as authorizing a permissive inference rather than a mandatory presumption. (Opinion by Wallin, J., with Trotter, P.J., and Sonenshine, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) **Parent and Child § 8 — Support, Care, and Education — Criminal Liability for Nonsupport — Constitutionality of Statutory Presumption Based on Non-payment. —** A father who failed to comply with a child support order entered in his presence pursuant to the Uniform Reciprocal Enforcement of Support Act was improperly adjudged to be in contempt of court based solely on the presumption mandated by

[180 Cal.App.3d 650]

Code Civ. Proc., § 1209.5 (presumption of contempt based on nonpayment of court-ordered support) without being given an opportunity to prove inability to pay. The statute creates an unconstitutional mandatory presumption that, while rebuttable, shifts the burden of proof to the accused, requiring him to prove his innocence. Contempt is quasi-criminal, and requires proof beyond a reasonable doubt, and the statutory presumption lessens the prosecution's burden of proof by obviating the necessity of proving an essential element of the case, the ability to pay. Although a court may determine a parent has the ability to pay a

certain amount of support, it does not necessarily follow that failing to comply with an order to that effect means the parent had such ability, so that the basic fact of non-compliance with a valid court order does not compel a finding of ability to pay.

(2) **Constitutional Law § 25 — Constitutionality of Legislation — Rules of Interpretation — Presumption of Constitutionality. —** Courts have a duty to presume the constitutionality of a statute and resolve any doubts in favor of its validity.

(3) **Criminal Law § 279 — Evidence — Presumptions and Inferences — Test of Constitutional Validity. —** Although inferences and presumptions are a staple of the adversary system of factfinding, the ultimate test in criminal cases of any device's constitutional validity in given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt.

(4) **Parent and Child § 8 — Support, Care, and Education — Criminal Liability for Nonsupport — Contempt — Defenses — Inability to Pay. —** Although a parent subject to an obligation to pay child support may petition the court for modification of the support order any time there is a change in financial condition, the continuing obligation to comply with a support order is founded on ability to pay. Ability to pay makes noncompliance wilful, and it is not contempt if not wilful due to inability to pay. Accordingly, such a parent, when subjected to contempt proceedings, may "sit on his hands," and defend any contempt allegation by relying on the

prosecution's burden of proof of affirmatively showing, beyond a reasonable doubt, his ability to comply with the order. He need not seek modification of the order before relying on this defense to contempt.

[Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony or child support, note, 53 A.L.R.2d 591. See also Cal.Jur.3d, Family Law, § 770; Am.Jur.2d, Divorce and Separation, § 1072.]

[180 Cal.App.3d 651]

(5) **Parent and Child § 8 — Support, Care, and Education — Criminal Liability for Nonsupport — Contempt — Statutory Presumption Based on Nonpayment — Permissive Inference.** — Code Civ. Proc., § 1209.5 (presumption of contempt based on nonpayment of court-ordered support), should be construed, in the context of contempt proceedings, as authorizing a permissive inference of wilful nonpayment, but not a mandatory presumption. A permissive inference of wilful failure to comply in spite of an ability to pay may constitutionally be drawn from the fact that a parent has failed to comply with a valid court order that was made after a determination of his or her then ability to pay. The prosecution retains the burden of proving every element of the offense, including ability to pay at the time payment was due, beyond a reasonable doubt.

COUNSEL

Ronald Y. Butler, Public Defender, Frank Scanlon, Assistant Public Defender, Richard Aronson, Richard Schwartzberg and Mark Licker, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Cecil Hicks, District Attorney, Michael R. Capizzi, Assistant District Attorney, William W. Bedsworth and E. Thomas Dunn, Jr., Deputy District Attorneys, for Real Party in Interest.

OPINION

WALLIN, J. — Phillip Feiock seeks relief from a judgment of contempt for failure to pay child support. His primary contention concerns the constitutionality of Code of Civil Procedure section 1209.5, which requires the court presume prima facie evidence of contempt after proof of noncompliance with a valid court order.

Feiock was ordered to pay child support for his three children as part of a dissolution action. Thereafter, in 1983 the District Attorney filed an action under the Uniform Reciprocal Enforcement of Support Act, which resulted in a temporary support order of $150 per month. Feiock's failure to pay anything between September of 1984 and February of 1985 resulted in a contempt action brought by the district attorney.

[180 Cal.App.3d 652]

At the adjudicated contempt hearing, the parties stipulated there was a valid court order requiring Feiock to pay $150 per month directly to the district attorney's office. They also agreed Feiock was present in court when the order was made. The prosecution then offered documentary evidence from its

own internal records showing Feiock's poor payment history. The trial judge suggested those records needed some explanation; an employee familiar with the record-keeping procedures testified at the judge's request. Feiock's motion for judgement of acquittal under Penal Code section 1118 was denied after the judge ruled the presumption mandated by Code of Civil Procedure section 1209.5 applied. Feiock then testified, essentially trying to prove his inability to pay the court-ordered support. Regardless, the trial judge sustained the majority of the contempt allegations.

Code of Civil Procedure section 1209.5 provides: "When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his child, proof that such order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

(1a) Feiock asserts Code of Civil Procedure section 1209.5 is unconstitutional because it is a mandatory presumption which shifts the burden of proof to the defendant, requiring him to prove his innocence. Our Supreme Court recently discussed the problems raised by the use of presumptions in criminal cases in *People v. Roder* (1983) 33 Cal.3d 491 [189 Cal.Rptr. 501, 658 P.2d 1302]. The Court found Penal Code section 496 prescribed an unconstitutional mandatory presumption because it relieved the prosecution from proving every element of the offense beyond a reasonable doubt. The Court's analysis in *Roder* mandates we reach the same conclusion with regard to Code of Civil Procedure section 1209.5.

(2) We begin by recognizing our duty to presume the constitutionality of a statute and resolve any doubts in favor of its validity. (*People v. Globe Grain & Mill Co.* (1930) 211 Cal. 121, 127 [294 P. 3].) We also recognize the impact our decision will have. (3) We are cognizant that "[i]nferences and

presumptions are a staple of our adversary system of factfinding . . . .Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. [Citations.]" (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156 [60 L.Ed.2d 777, 791, 99 S.Ct. 2213], quoted in *People v. Roder, supra*, 33 Cal.3d at p. 497.)

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(1b) Relying on relatively recent authority from the United States Supreme Court, *Roder* emphasized the distinction between permissive presumptions and mandatory presumptions. The former allows but does not require the inference; the latter requires the inference unless the defendant rebuts it. We borrow liberally from *Roder*, which quotes *Ulster* extensively: "With respect to a permissive inference, the [*Ulster*] court reasoned that '[b]ecause this [type of device] leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.' [*Ulster County Court v. Allen, supra*, 442 U.S. at p. 157 [60 L.Ed.2d at p. 792].] . . . [1] On the other hand, the court recognized that '[a] mandatory presumption is a far more troublesome evidentiary device' insofar as the reasonable doubt standard is concerned. (*Ibid.*) Because such a presumption tells the trier of fact that it *must* assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts, it limits the jury's freedom independently to assess all of the prosecution's evidence in order to determine whether the facts of the particular case establish guilt beyond a reasonable doubt. For that reason, the court concluded that a mandatory presumption must be judged 'on its face,' not 'as applied' (*id.*, at pp. 157-

160 [60 L.Ed.2d at pp. 792-794]), and that 'since the prosecution bears the burden of establishing guilt, it may not rest its case on [such] a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt.' (*Id.*, at p. 167 [60 L.Ed.2d at p. 798].)" (*People v. Roder, supra*, 33 Cal.3d at p. 498, fn. omitted.)

Code of Civil Procedure section 1209.5 establishes a mandatory presumption within the meaning of *Ulster* and *Roder*. (See also *Sandstrom v. Montana* (1979) 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450].) It requires the inference rather than suggesting the inference may logically follow. The trier of fact is required to find a prima facie case of contempt whenever a valid court order is not obeyed. Although rebuttable, the presumption actually shifts the burden of proof to the accused. (*People v. Roder, supra*, 33 Cal.3d at p. 501.)

Contempt is quasi-criminal and requires proof beyond a reasonable doubt. (*In re Witherspoon* (1984) 162 Cal.App.3d 1000, 1001-1002 [209 Cal.Rptr. 67].) Requiring the finder of fact to presume a prima facie case of contempt upon a showing of noncompliance with a valid court order lessens the prosecution's burden of proof by obviating the necessity of proving an essential element of the case: the ability to pay. (*Nutter v. Superior Court* (1960) 183 Cal.App.2d 72 [6 Cal.Rptr. 404]) This lessening of the prosecution's burden is a constitutional defect, unless the basic fact proved — noncompliance

[180 Cal.App.3d 654]

with a valid court order — "*compels* the inference of guilt beyond a reasonable doubt." (*People v. Roder, supra*, 33 Cal.3d at p. 498, fn. 7.)

Even though a court may determine a parent has the ability to pay a certain amount of support, it does not necessarily follow failing to comply with an order to that effect means the parent had the ability to pay thereafter. Thus, the basic fact — noncompliance with a valid court order — does not compel the

conclusion that the alleged contemnor had the ability to pay. While we recognize the inference is compelling for some period of time following the court's order and initial determination of ability to pay, we review the constitutionality of the presumption on its face, not as applied. (*People v. Roder, supra*, 33 Cal.3d at p. 498; *People v. Milham* (1984) 159 Cal.App.3d 487, 504 [205 Cal.Rptr. 688].) Obviously, financial circumstances change. The inference of continuing ability to pay weakens with the passage of time.

(4) Real party in interest argues a parent can petition the court for modification of the support order any time there is a change in financial condition. We are therefore urged to conclude it was Feiock's responsibility to comply with the order unless it was modified; indeed, he has a continuing obligation to comply with the order even as his writ petition is pending. True. However, his obligation to abide by the court's order is founded on ability to pay. Ability to pay makes noncompliance wilful; it is not contempt if not wilful because of inability to pay. Therefore, despite the continuing obligation to comply, Feiock "may literally 'sit on his hands,'" and defend any contempt allegation by relying on the prosecution's burden of proof: its burden to affirmatively show, beyond a reasonable doubt, his ability to comply with the order, to wit, his ability to pay. (*People v. Milham, supra*, 159 Cal.App.3d at P. 504, quoting from *Coffin v. United States* (1895) 156 U.S. 432 [39 L.Ed. 481, 15 S.Ct. 394].) He need not seek modification of the order before relying on this defense to contempt.[1]

(1c) By the same token, the Legislature may not take away this defense by imposing a mandatory presumption compelling a conclusion of guilt without independent proof of an ability to pay. The statute which purports to require that conclusion, section 1209.5 of the Code of Civil Procedure, is unconstitu-

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[1]Of course the contempt action has no effect on his continuing obligation to comply with the court order until it is modified.

tional because the mandatory nature or the presumption lessens the prosecution's burden of proof.

Our analysis does not entirely ignore *Martin v. Superior Court* (1971) 17 Cal.App.3d 412 [95 Cal.Rptr. 110], which upheld the constitutionality of

[180 Cal.App.3d 655]

Code of Civil Procedure section 1209.5 under similar attack. However, *Martin* predated *Roder* and the United States Supreme Court decisions *Roder* relied on. *Martin* did not have the benefit of our Supreme Court's subsequent analysis of mandatory presumptions which affect the burden of proof in criminal cases. Even more importantly, *Martin* relies on *People v. Stevenson* (1962) 58 Cal.2d 794 [26 Cal.Rptr. 297, 376 P.2d 297], which involved a rebuttable presumption and is of questionable authority in light of *Roder*. *Martin* stated there is no constitutional infirmity unless "'there is no rational connection between the fact proved and the fact presumed . . . .'" (*Martin v. Superior Court, supra*, 17 Cal.App.3d at p. 415, quoting from *People v. Stevenson, supra*, 58 Cal.2d at p. 797.) As previously noted, a rational connection is insufficient. A mandatory presumption is constitutionally infirm unless "the basic fact proved *compels* the inference of guilt beyond a reasonable doubt." (*People v. Roder*, supra, 33 Cal.3d at p. 498, fn. 7.) In light of recent authority, *Martin* is unpersuasive.

After Feiock stipulated to the validity of a court order for support, made in his presence, and the prosecution proved noncompliance with that order, the trial judge relied on the mandatory presumption of Code of Civil Procedure section 1209.5 and denied his motion for judgment of acquittal. The motion should have been granted because the presumption is unconstitutional. We need not reach the balance of Feiock's complaints.

(5) For future guidance, however, we determine the statute in question should be construed as authorizing a permissive inference, but not a mandatory presumption. (*People v. Roder, supra*, 33 Cal.3d at p. 507.) The attorney General in *Roder* contended Penal Code section 496 should not be struck down in its entirety, and that the Court had an obligation to interpret the statute to preserve its constitutionality whenever possible. (*Id.*, at p. 505.) The Court agreed and held, on retrial, the court "should fashion an appropriate instruction, which informs the jury of the permissive inference but at the same time makes clear that the prosecution retains the burden of proving every element of the offense a beyond reasonable doubt. [Citation.]" (*Id.*, at p. 507.)

The same logic applies here. A permissive inference of wilful failure to comply in spite of an ability to pay may constitutionally be drawn from the fact a parent has failed to comply with a valid court order which was made after a determination of his or her then ability to pay. But the inference is permissive only. The prosecution retains the burden of proving every element of the offense, including ability to pay at the time payment was due,

[180 Cal.App.3d 656]

beyond a reasonable doubt.[2] In the future, Code of Civil Procedure section 1209.5 should be construed as allowing a permissive inference.

The judgment of contempt is annulled.

Trotter, P.J., and Sonenshine, J., concurred.

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[2]Ability to pay may be shown by some evidence of the alleged contemnor's financial condition at the time payments were due. For example, the moving party might subpoena employment records. The only effect of our holding today is to eliminate using the presumption as conclusive evidence of ability to comply with the court order.

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, No. G003512

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

IN RE PHILLIP WILLIAM FEIOCK

on

HABEAS CORPUS

Petition for review of Real Party in Interest, CECIL HICKS, District Attorney for County of Orange, acting on behalf of ALTA SUE FEIOCK DENIED.

Lucas, J., is of the opinion the petition should be granted.

BIRD

Chief Justice

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

2. The Fifth Amendment to the United States Constitution provides in part:

> "No person . . . shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

3. California *Code of Civil Procedure*, section 1209.5, provides:

> "When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his child, proof that such order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

4. California *Code of Civil Procedure*, section 1672 (Revised Uniform Reciprocal Enforcement of Support Act of 1968) states in part:

> "All duties of support, including the duty to pay arrearages, are enforceable by an action under this title, including a proceeding for civil contempt."

5. 45 C.F.R. section 303.6 provides in pertinent part:

> For all cases under the State plan in which the obligation to support and the amount of the obligation have been established, the IV-D agency must maintain an effective system for identifying, within 3 days, those cases in which there is a failure to comply with the support obligation and to contact such delinquent individuals as soon as possible in order to enforce the obligation and obtain the current support obligation and any arrearages. Such attempts to collect support must include the institution of the following procedures as applicable and necessary:
>
> (a) Contempt proceedings to enforce an extant court order . . . "

6. California *Civil Code*, section 196, states in relevant part:

> "The father and mother of a child have an equal responsibility to support and educate their child."

7. California *Civil Code*, section 206, provides:

> "It is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability . . . "

8. California *Civil Code*, section 4700(a) provides in pertinent part:

> "All payments of support shall be made by the person owing the support payment prior to the payment of any debts owing to creditors."

PROOF OF SERVICE BY MAIL

I, Carol E. Anderson, declare that I am a resident of the County of Orange, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 408 N. Spurgeon, Santa Ana, California.

On the 12th day of November, 1986, I served within PETITION FOR WRIT OF CERTIORARI on the Respondents herein, by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

California Supreme Court
3580 Wilshire Blvd.
Los Angeles, CA 90010

District Court of Appeal
Fourth District, Division Three
600 Santa Ana Blvd.
Santa Ana, CA 92712

John K. Van De Kamp
Attorney General
3580 Wilshire Blvd.
Los Angeles, CA 90010

Gary L. Granville
Clerk, Orange County
P.O. Box 838
Santa Ana, CA 92702

Richard L. Schwartzberg
Attorney at Law
401 Civic Center Drive West
Santa Ana, CA 92701
(3 copies)

Clerk, United States Supreme Court
One First St., N.W.
Washington, D.C. 20543
(Original and 40 copies)

All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 1986, at Santa Ana, California.

Carol E. Anderson
(Original signed)

OPPOSITION

BRIEF

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-787

CECIL HICKS, DISTRICT ATTORNEY FOR ORANGE COUNTY, CALIFORNIA, ON BEHALF OF ALTA SUE FEIOCK,

Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,

Respondent.

On Writ of Certiorari to the Court of Appeal of California Fourth Appellate District, Division Three

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RESPONDENT'S BRIEF IN OPPOSITION

Richard Lynn Schwartzberg
401 Civic Center Drive West
Suite 820
Santa Ana, California 92701
(714) 835-3339

Counsel for Respondent
Phillip William Feiock

QUESTION PRESENTED

This petition does not present a Federal or Constitutional question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Respondent, Phillip William Feiock, respectfully requests this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Court of Appeal of California, Fourth Appellate District, Division Three in this matter, decided April 30, 1986. The opinion is reported at 180 Cal. App. 3d 649.

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case sans editorial. (See Petition for Writ of Certiorari, pp. 3-7.)

STATEMENT OF FACTS

Respondent entered into an interlocutory judgment of dissolution with Alta Sue Feiock on January 20, 1976. The judgment required respondent to pay $35.00 per month child support for each of three children. The January 20, 1976, support order was modified on June 1, 1976 to increase the payments to $75.00 per child.

On April 11, 1983 a Uniform Reciprocal Enforcement of Support Act petition was filed. On June 22, 1984, respondent appeared without council, and based upon representations of the People, the superior court ordered temporary support pending the petition. At that hearing, the court ordered respondent to testify concerning his income and expenses.

Respondent testified he had been unemployed and had recently started up a business. (R.T., pp. 2, 4.)[1] Respondent had netted $92.00. (R.T., p. 7.) After determining "[w]ell, you're going to have to pay some

[1] All references are to the Reporter's Transcript of proceedings of June 22, 1984.

support, you know?" the court ordered respondent to make payments of $50.00 per month per child and ordered respondent to return in ninety days to review his circumstances. (R.T., pp. 10-11.)

Ninety days later respondent again appeared without counsel with the proceeding continued subsequently to November 16, 1984 and February 22, 1985. On the latter date, the proceeding went off-calendar.

Petitioner, through the Orange County District Attorney, filed an order to show cause re contempt on March 5, 1985 alleging six counts of contempt from July 1984 to February 1985. A second order to show cause re contempt was filed on June 12, 1985 by petitioner through the Orange County District Attorney alleging three additional counts of contempt covering the period March 1985 to May 1985. On that date respondent was determined to be indigent and was provided the services of the Orange County Public Defender. Both orders to show cause were consolidated for trial.

On August 9, 1985, trial was heard before the superior court. The only evidence offered by petitioner was a computer print-out from the Orange County District Attorney's Support Division purporting to evidence respondent's payment history (r.t, p. 3)[2]. Petitioner then rested.

Respondent's non-suit was denied relying on California Code of Civil Procedure section 1209.5. (R.T., pp. 5, 22.) Respondent then testified in his own behalf. Respondent testified in October 1984 he was unable to make support payments because his partner unilaterally dissolved their partnership and took with her $2,500 in accounts payable without his consent. (R.T., p. 25.) Respondent then was forced to run the business alone, sleeping in either a garage or van. (R.T., p. 27.) In November 1984 respondent

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2 All references are to the Reporter's Transcript of proceedings of August 9, 1985.

testified the business was "not doing very well." (IBID.) Respondent introduced his business and expense balance sheets for January, February and March of 1985. (R.T., p. 28.)

The court found respondent in contempt for October, November, December 1984, and March and April 1985.

REASONS WHY THE PETITION SHOULD BE DENIED

1.

THERE IS NO FEDERAL OR CONSTITUTIONAL ISSUE PRESENTED

As Justice O'Conner pointed out in California v. Ramos (1983) 463 U.S. 992, 1014-1015,

> "It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."

The axiom that California may afford its citizens greater protections than that offered by the Federal Constitution is precisely why the Petition for Certiorari now before the Court presents no Federal Constitutional issue. For as the California Supreme Court has for over a century held, civil contempts in California are treated as either criminal or quasi-criminal proceedings, and based upon that determination, are subject to far greater protections than that afforded by the Federal government or other states with respect to civil contempt.

Petitioner presents two issues for resolution by this Court. First, did the Court of Appeal err in holding that an inability to pay is an element of contempt pursuant to Code of Civil Procedure section 1209? While an interesting issue, never presented to the California Court of Appeal nor Supreme Court, it is utterly void of any Federal or Constitutional basis upon which petitioner may seek redress in this Court. Simply put, whether California chooses to treat an ability to pay as an element of contempt is purely a State decision.

That issue, resolved sub silentio by the Court of Appeal,

is purely a matter of state interpretation. In this case, the appellate court simply interpreted a state statute (Code Civ. Proc.) to require as an element of the crime of contempt the ability to pay. Whether this Court were to intervene on the issue of the Constitutionality of Code of Civil Procedure section 1209.5 or not, this Court is without jurisdiction to redefine the elements of Code of Civil Procedure section 1209. That issue is final.

The second more important issue presented is whether Ulster County Court v. Allen (1979) 442 U.S. 140, and Sandstrom v. Montana (1979) 442 U.S. 513 are applicable to civil contempts pursuant to Code of Civil Procedure section 1209. While petitioner looks to federal decisions (Tot v. United States (1943) 319 U.S. 463, United States v. Rylander (1983) 460 U.S. 752) to define or distinguish criminal from civil contempts[3], it is clear California does not. The California Legislature has allowed a long string of decisions beginning in 1893 to exist which have, with clarity and forcefulness, declared that California considers all contempts, whether labelled civil or criminal, to be treated as criminal proceedings. More importantly, flowing from that recognition are various rights other states and the federal government reserve only to those contempts determined to be criminal. In sum, whether this Court interprets Federal contempt to be civil, whether sister states make the same choice, California does not.

The California Supreme Court commenced the process of blurring the traditional distinction between civil and criminal contempts in 1893. In Ex parte Gould (1893) 99 Cal. 360, the Court faced the first attempt to force a contemnor

3 For purposes of opposing the Petition for Certiorari, respondent assumes that should California treat Code of Civil Procedure section 1209 contempts as civil that petitioner is correct. Respondent would reserve for a brief on the merits the accuracy of that position.

to testify against himself.[4] In annulling the contempt, the Court noted,

> "'Contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes in summary proceeding, as it was in this case. In either mode, the adjudication against an offender is a conviction, and the commitment in consequence is execution.'" (Id., at p. 362.)

Fifty-nine years later the Supreme Court again confronted the distinction, nonexistent in California, between civil and criminal contempt. In City of Culver City v. Superior Court (1952) 38 Cal. 2d 535 the court annulled a contempt finding against members of the Culver City city council. It was alleged the city had violated an injunction regarding the funding of various municipal bonds. The Supreme Court was clear and direct.

> "Petitioner's argue at some length concerning the distinction between civil and criminal contempt. From the beginning of this proceeding petitioners have urged that they should be advised whether the proceeding was for criminal contempt, civil contempt, or both, and that the proceeding is fatally defective because the two types of contempt were 'scrambled.'
>
> The distinction between civil and criminal contempt is important in the federal and some state courts because there are procedural differences, particularly in the safeguards afforded the citee, and also perhaps, differences in the nature of the intent which must be shown. [Citations.] But in California the proceedings leading to punishment for failure to obey a decree (criminal contempt) and to imprisonment until the omitted act is performed (civil contempt) are exactly the same. (Code of Civ. Proc., §§1209-1219; see In re Morris (1924) 194 Cal. 63, 67.) Although the sections which provide the procedure for both kinds of contempt are in Part III of the Code of Civil Procedure, which is entitled 'Special Proceedings of a Civil Nature,' contempt proceedings are said to be 'criminal in nature' and those procedural rights and safeguards which are appropriate to criminal proceedings are also afforded, in California, in civil proceedings." (Id., at p. 541, emphasis

4 The facts sound suspiciously like a Federal civil contempt since the order of the trial court was incarceration until the contemner agreed to testify.

added.)[5]

Culver City is not alone. Twenty-five years later the California Supreme Court twice reached the same conclusion and result. In In re Coleman (1974) 12 Cal. 3d 568 and Ross v. Superior Court (1977) 19 Cal. 3d 899 the Court again held that contempt in California is treated as criminal or quasi-criminal proceedings and offer to contemners various rights reserved to criminal defendants. In Ross the Court directly held the standard of proof in contempts in California to be beyond a reasonable doubt noting,

> "For almost a century, our court has repeatedly emphasized that in California ALL contempt proceedings are quasi-criminal in nature and that, as a consequence, 'an accused on trial for contempt must be proved guilty beyond a reasonable doubt.'" (Id., at p. 913, emph. added.)[6]

And on January 2, 1987 the Supreme Court of California again made it clear California treats "civil contempts" as criminal proceedings. In Mitchell v. Superior Court (S.F. 24790, Jan. 2, 1987) ___ Cal. 3d ___[7] the Court determined that a contempt under California's Red-Light Abatement Act (Pen. Code, § 11229) punishable by up to six months in jail entitled the contemnor to a jury trial.

The decisions of the intermediate California appellate courts enforcing the application of due process and Fifth Amendment standards to civil contempts are legion in California. In Gibson v. Gibson (1971) 15 Cal. App. 3d 943 the court of appeal vacated a damage suit which arose when a contemner abducted a child for which a custody order was in

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5 It is curious that petitioner did not seek to distinguish or explain the Court's language in Culver City notwithstanding respondent having relied on the decision in opposing a stay of the remittitur. (See Response to Application for Stay of Remittitur, pp. 5-6.)

6 Petitioner's concern for the effect of the court of appeal's decision in Feiock would have been better placed in worrying about the standard of proof.

7 The decision has not yet reached the advance sheets nor does counsel have a slip opinion with which to work. The decision was reported in its entirety at 87 D.A.R. 153 (Los Angeles Daily Journal) on January 14, 1987.

effect. The defendant in the suit argued her acquittal in an earlier contempt proceeding barred recovery. The court agreed stating,

> "We think the alleged contempt in this case must be treated as quasi-criminal in nature [citations], and it was so treated by the parties throughout the proceedings. 'A contempt proceeding is not a civil action but is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action . . .'" (Id., at p. 948.)

In a classic civil contempt by Federal standards, California still adhered to the criminal label. In In re Farr (1976) 64 Cal. App. 3d 605, the contemner was jailed until he testified in a criminal proceeding regarding a breach of the trial court's orders. As a newsman, Farr had refused to divulge a source for his material. The court of appeal again held,

> "The Code of Civil Procedure enumerates the court's powers respecting the conduct of contempt proceedings (§128); defines acts and omissions constituting contempt (§1209), direct and indirect contempt and the procedures therefor (§1211); and prescribes punishment (§1219). Thus upon adjudication of contempt 'a fine may be imposed on [contemner] not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both; . . .' (§1218, Code Civ. Proc.) Because of the penalties imposed under this section, contempt **is criminal** in nature." (Id., at p. 613, emph. added.)

In a decision closely resembling the issue before this Court, the court of appeal in Hickman v. Superior Court (1965) 233 Cal. App. 2d 664 applied criminal due process to a civil contempt involving the **failure to pay spousal support and ordered attorneys fees.** In annulling the contempt for failure of proof, the court of appeal reasoned,

> "A hearing on an order to show cause why the alleged contemner should not be held in contempt is in its nature a criminal proceeding. [Citation.]" (Id., at pp. 670-671.)

Finally, the Ninth Circuit relying on a California decision grasped the distinction made in California (or lack thereof) that all contempts are criminal. The court noted,

> "section 1209 of the Code Civ. Proc. lists eleven types of 'contempts of the authority of the court.' Contempt proceedings brought under this section, as distinguished from §166, Penal Code, are not 'criminal' proceedings, as a matter of terminology, although they are **criminal in character**. Pacific Tel. & Tel. Co. v.Superior Court, 265 Cal. App. 2d 370, 72 Cal. Rptr. 177 (1968)." (Bell v. Hongisto (9th Cir. 1974) 501 F. 2d 346, 351, bold emph. added.)

In summary, while California utilizes language which refers to both the criminal and civil nature of contempts (Code Civ. Proc., §1209), the courts have long held that the punishment to be potentially meted out requires that California treat them as crimes. The result is that the court of appeal, based upon an interpretation of California law, correctly applied Constitutional principles. More importantly, California's treatment of civil and criminal contempts, in providing its citizens with greater protection, presents no Federal or Constitutional issue to this Court.[8]

---

8 Were the Court to conclude otherwise, it is still incumbent upon the Court to return the proceeding to the court of appeal to determine if California chooses to provide its citizens the greater protection of the Due Process Clause.

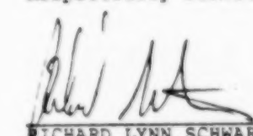
CONCLUSION

Justice Rehnquist, in his dissent in Green v. Georgia (1979) 442 U.S. 95 complained of the Court's actions,

> "Nothing in the United States Constitution gives the Court any authority to supercede a State's code of evidence . . ." (Id., at p. 99.)

Historically, California's Code of Civil Procedure and decisions of its highest court have provided the citizens of California with the protections afforded criminal defendants in all contempt proceedings. In so doing, the court of appeal determined that Phillip William Feiock's right to due process and self-incrimination were violated. This Court is presented with no Federal or Constitutional issue. The petition should be denied.

Respectfully submitted,



RICHARD LYNN SCHWARTZBERG
Counsel for Respondent

JOINT

APPENDIX

No. 86-787

In The

Supreme Court of the United States

October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF ALTA SUE FEIOCK,

Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

JOINT APPENDIX

CECIL HICKS, District Attorney
County of Orange, State of California
MICHAEL R. CAPIZZI, Chief Assistant District Attorney*
MAURICE L. EVANS, Assistant District Attorney
BRENT F. ROMNEY, Deputy-in-Charge Writs and Appeals Section
BRUCE M. PATTERSON, Division Chief Family Support Division
E. THOMAS DUNN, JR., Deputy District Attorney
Post Office Box 808
Santa Ana, California 92702
Telephone: (714) 834-3600
Counsel for Petitioner

RICHARD LYNN SCHWARTZBERG, Attorney at Law
401 Civic Center Drive West
Suite 820
Santa Ana, California 92701
Telephone: (714) 835-3339
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1986
CERTIORARI GRANTED MARCH 9, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

The following have been omitted in this Appendix and are appended to the Petition for Certiorari on the pages indicated:

RELEVANT DOCKET ENTRIES

April 11, 1983	URESA Petition filed in Feiock vs. Feiock, Superior Court Case Number 40-07-51
June 22, 1984	Order re Child Support filed
March 5, 1985	Order to Show Cause and Declaration for Contempt filed by Orange County District Attorney (Counts 1-6)
June 12, 1985	Order to Show Cause and Declaration for Contempt filed by Orange County District Attorney (Counts 7-9)
August 9, 1985	Judgment of Contempt and Order to Purge Child Support Arrears entered after Hearing in Superior Court
December 4, 1985	Petition for Writ of Habeas Corpus filed in California Court of Appeal, Fourth Appellate District, Division Three
January 9, 1986	Order to Show Cause issued by California Court of Appeal, Fourth Appellate District, Division Three, ordering Orange County District Attorney to show cause why August 9, 1985, Contempt Judgment should not be annulled, vacated and set aside.
February 11, 1986	Return to Order to Show Cause filed by District Attorney
March 3, 1986	Traverse to Order to Show Cause filed
April 22, 1986	Minute Order filed reflecting Oral Argument held in California Court of Appeal

April 30, 1986 Writ of Habeas Corpus granted; Opinion of California Court of Appeal filed

June 9, 1986 Petition For Review filed in the California Supreme Court

August 14, 1986 Order Denying Review by California Supreme Court filed

August 26, 1986 Remittitur issued by Clerk of the Court of Appeal

September 29, 1986 Application for Stay of Enforcement of Judgment and Recall of Remittitur filed in Court of Appeal

October 6, 1986 Order Denying Application for Stay of Enforcement of Judgment and Recall of Remittitur filed

October 14, 1986 Application for Stay of Enforcement of Judgment filed in the Supreme Court of the United States (No. A-288)

October 23, 1986 Order Granting Application for Stay of Enforcement of Judgment; Memorandum opinion by J. O'Connor filed in *Hicks v. Feiock*, 479 U.S. —, 107 S.Ct. 259, 93 L.Ed.2d 237 (1986).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

ALTA SUE FEIOCK,
Petitioner,
VS
PHILLIP WILLIAM FEIOCK,
Respondent.

CASE NO. 40-07-51
URESA Petition
(Filed April 11, 1983)

The attached document is hereby filed with the Orange County Clerk pursuant to Section 1680a of the California Code of Civil Procedure.

/s/ Teresa A. Viscoli
Deputy District Attorney

IN THE COURT OF COMMON PLEAS
FAMILY COURT DIVISION
STARK COUNTY, OHIO

ALTA SUE FEIOCK,
Plaintiff,
vs.
PHILLIP WILLIAM FEIOCK,
Defendant.

CASE NO. DR 92808
PETITION FOR:
SUPPORT/ARREARAGE

(Filed March 24, 1983)

1. Now comes the Plaintiff and states that she is a resident of the County of Stark, State of Ohio, and that the defendant has his residence and domicile in the city of Dana Point, County of Orange, and State of California, and that said defendant is subject to the jurisdiction of the courts of the state of California.

2. Plaintiff further says that the defendant married, on the 28th day of June, 1968, at Mexico, which marriage has been dissolved on the 12th day of January, 1976 in Orange County, California, in case #D85428 (a copy of which is attached marked Exhibit A) and that the Plaintiff is the Mother and the Defendant is the Father of the following named dependents, to-wit:

1. Douglas William ; Age 14 Born 12-18-1969

2. Robert Martin ; Age 13 Born 1-13-71

3. Jennifer Jean ; Age 11 Born 9-11-72

who are not emancipated and are living with Plaintiff at 6642 Casper Dr. N.W. Canton, Ohio and have not been recipients of Aid to Dependent Children . . .

3. Plaintiff says that she and said children are entitled to support from the defendant pursuant to the provisions of the Uniform Reciprocal Enforcement Of Support Act of the State of Ohio (Chapter 3115 Ohio Revised Code, a copy of which is attached and made a part hereof).

4. Plaintiff says that defendant is able bodied and employed by reason whereof, he is well and able to support his dependents, but has since the 24th day of December, 1982, failed and refused to support them, according to his means and capacity.

5. That upon information and belief, defendant's present address is as follows: c/o Hair Biz, Etc., 33661 Del Opisto, Dana Point, California 92629, within the jurisdiction of the court of California which state has enacted a law substantially similar to the Uniform Reciprocal Enforcement Of Support Act of this state.

6. Plaintiff says that the children are in good health, that there is a present order of support of $225.00 per month; and that she requires the sum of $225.00 per month for the support of said children.

7. Plaintiff says that defendant is believed to be employed at Hair Biz, Etc., 33661 Del Opisto, Dana Point, California, earning $unknown per month.
(714) 496-2420
and that a description of defendant is as follows:

Age: 40

Date of birth: August 25, 1942

Height: 6'

Weight: 160#

Color Eyes: Hazel

Color Hair: Light brown and thinning

Beard or Moustache:

Social Security Number:

Race: White

Distinguishing Marks:

Scar on top of his forehead right side

Military Record: Navy

Criminal Record: Conviction for trafficking Pornographic materials

Wherefore, plaintiff prays that this Court determine that said defendant owes a duty of support to the aforesaid dependents, that he be ordered to pay the monthly sum of $225.00 per month from the date of filing of this petition, and the aggregate sum of $2,300 which represents the arrearage reimbursement figure owed the plaintiff, that this Court cause certified copies of this petition and its order to be transmitted to the proper Court of record of the state of California, having jurisdiction of

said defendant and for such other and further relief as may be just and proper.

[Signatures omitted in printing]

In The Court Of Common Pleas
Family Court Division
Uniform Depenency Act

STATE OF OHIO:)
) SS:
STARK COUNTY:)

Alta Sue Feiock,

Plaintiff,

VS.

Findings, Certificate and Order — Uniform Reciprocal Enforcement Of Support Act

Phillip William Feiock,

Defendant.

Upon motion of the counsel for the plaintiff, from the verified complaint on file herein, the Court makes the following, Findings, Certificate and Order:

That the verified complaint sets forth facts from which the following may be determined: that the defendant, Phillip William Feiock, owes a duty of support of the dependents herein named, according to the allegations set forth in said complaint; and that the County of Orange, State of California may obtain jurisdiction over the defendant or his property.

IT IS THEREFORE ORDERED THAT THE CLERK OF THIS COURT prepare three (3) copies of the complaint, this certificate and the Uniform Reciprocal Enforcement of Support Act of the State of Ohio; and that he transmit said documents, forthwith, to the Clerk of the Court of Orange, Santa Ana, California.

/s/ W. Don Ready
Judge Of The Court Of Common Pleas
Family Court Division

Dated: March 22, 1983

* * *

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

In re the marriage of	Case Number
Petitioner: Alta S. Feiock	D 85428
and	Interlocutory Judgment Of Dissolution Of Marriage
Respondent: Philip W. Feiock	(Filed January 20, 1976)

This proceeding was heard on 1/12/76 before the Honorable James O. Perez, Department No. 29.

The court acquired jurisdiction of the respondent on 11/10/75 by:

[X] Service of process on that date, respondent not having appeared within the time permitted by law.

[ ] Service of process on that date and respondent having appeared.

[ ] Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be

necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The Court also orders that the custody of the minor children of the parties, Douglas W. Feiock, born December 18, 1969, Robert M. Feiock, born January 13, 1971, and Jennifer J. Feiock, born September 11, 1972, be and the same hereby is awarded to the petitioner with reasonable rights of visitation reserved to Respondent.

The Court also orders that Respondent shall pay to Petitioner [ ] the sum of $35.00 per month per child for the support and maintenance of the minor children Douglas W. Feiock, Robert M. Feiock and Jennifer Feiock, for a total of $105.00 per month, payable one-half on the 1st and one-half on the 15th of each month, commencing February 1, 1976, and continuing for four (4) months. The Court also orders that thereafter commencing on June 1, 1976, that Respondent shall pay to Petitioner the sum of $75.00 per month per child, for a total of $225.00 per month for the support and maintenance of the said minor children, payable one-half on the 1st and one-half on the 15th of each month commencing June 1, 1976, and continuing until the said minor children marry, become self-supporting or attain the age of eighteen (18) years, or until further order of the Court whichever occurs first.

* * *

Dated: January 19, 1976.

/s/ James O. Perez
Judge of the Superior Court

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 18

[caption omitted]

HONORABLE THEODORE E. MILLARD,
JUDGE PRESIDING
REPORTER'S TRANSCRIPT

JUNE 22, 1984

* * *

[page 3]

By Ms. Geiser-Sandoval Q Mr. Feiock, are you presently working?

A Yes.

Q And where is it that you're working?

A Forever Flowers.

Q What is it that you do for that business?

A I'm a partner in it. I manage the factory and production of the flowers.

Q And do you have a factory, then, or —

A Well, it's a wholesale warehouse.

Q And where is that located?

A Laguna Hills.

Q And are you renting that facility, or —

[page 4]

A Yes. Leasing it.

Q And when did you start this business?

A About a month and a half ago. The business has been in existence for about four years. I came in as a partner about a month and a half ago.

Q And what has the business been netting over the last four years?

A Well, about fifteen hundred to two thousand a month, but that was out of my partner's garage. We just acquired a building when I went in.

Q Did you put some money up into this venture?

A No.

Q So, you're—how did you become a partner?

A I was selling flowers wholesale, and I met her through that process, and she had more orders than she could fill and she needed somebody to run her factory, so we entered into that type of agreement.

Q And what is the agreement?

A Well, we haven't actually formalized it yet, but I'll get forty percent of the profits and she gets sixty percent until we reach a point where the gross sales are ten thousand a month, and then the profits will be split fifty/fifty, unless there's a change in the agreement we have over the duties that we perform at this point.

Q And did you have another business before this business?

[page 5]

A Yeah. I had a hair salon that went under in February.

Q Did you have any monies at all from that? Did you receive any money from the sale of that?

A No. The buyers paid all of the debts and assumed the lease.

Q Do you have any other sources of income, or do you have any other assets?

A No.

I have a car.

Q And what are your living expenses?

A Well, my rent will be four hundred. It's sort of based on the partner. I'm sharing a house with my partner, and when the profits—I am not paying those living expenses now because she gets her sixty percent first to a minimum of $2500 profit. When the profit gets over $2500, then I get forty percent. But if the profit is below $2500, she gets the first $2500.

But because I'm living in the same house she picks up all the rent and everything out of that first twenty-five hundred.

Q So, at this time you have no living expenses until you start making—

A Until I start making money.

Q Until the business starts making money. And how much was your share that you made last

[page 6]

month?

A The profit after her twenty-five hundred was $92.00, but I did receive some money from day to day for gas expenses, food expenses.

Q So there was more than that—

A Ten dollars a day.

Q Ninety-two plus that amount? Am I correct on that, or—

A Ninety-two, plus maybe $10.00 a day gas and food expenses.

Q And what are you projecting that you're going to make next month, as your percentage?

A It's difficult to say. Our projections were that $6000 total sales would be a break-even point. We did have about seventy-five hundred last month, and this month we were on a course that would probably give us about eighty-five hundred total sales.

Q So, $8500 total sales, you're going to get forty percent; am I correct?

A No. That's eighty-five hundred total sales minus expenses, and then there's, the expenses, run us probably fifty to sixty percent, depending on the amount of sales, labor and—it just depends on what our costs are.

Q Well, how much were your sales that netted you $92.00?

A A little over seventy-five hundred.

• • •

[page 7]

The Court: How much do you feel you can afford to pay for the support of your minor children on a temporary basis until you get this business off the ground?

The Respondent: It would have to be based on future income, and it's really, I really don't know. I can't say what the business is going to do this month based on the gift show.

People ask me for projected income. I really can't give an answer because I can't—I know what our projections are. It's for $8000 sales a month, and then up to ten thousand within six months.

[page 8]

The Court: Well, off of $8000 a month, what would your share of the profits be?

The Respondent: My share would be about twelve hundred on eight thousand, provided that the expenses stay as they are.

• • •

The Court: Well, you have three minor children. and you were ordered—well, there is an order. Nothing I'm going to do today is going to affect the order. You understand that, right?

The Respondent: Yes, Your Honor.

The Court: So, the other Orange County Order for $225 per month goes on until it's modified by some other subsequent order.

• • •

[page 10]

The Court: Well, you're going to have to pay some support, you know? And I'm inclined to, based upon what you tell me about your projections for this month, and this

[page 11]

month is almost over, I'm inclined to order you to pay at least $50.00 per month per child on a temporary basis.

• • •

The Court: Okay. So, I'm going to direct you to make the payments commencing July 1, 1984, in the manner and method of the Order I'm about to sign, and I'm going to reserve jurisdiction over the arrearages. I hope you get your business going.

The Respondent: Thank you, Your Honor.

Ms. Geiser-Sandoval: Thank you, Your Honor.

(Proceedings Concluded.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

In re the matter of	Case No. 40-07-51
Petitioner: Alta Sue Feiock	Order
and	Re Support
Respondent:	(Filed June 22, 1984)
Phillip William Feiock	

(X) This cause came on for hearing June 22, 1984, in Dept. No. 18 of the above-entitled court, the Honorable Theodore E. Millard, Judge presiding, upon application from Cecil Hicks, District Attorney, County of Orange, for:

(X) Order to Show Cause • • • (X) Re Child Support • • •

Petitioner ( ) present (X) not present represented by Atty. Gay Geiser-Sandoval

Respondent (X) present ( ) not present represented by Atty. pro per

• • •

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

(X) Upon all evidence and good cause appearing.

• • •

2. (X) (The Court orders Respondent to pay) the sum of $50.00 per month per child for the support of the child(ren) Douglas Feiock DOB: 12/18/69, Jennifer Feiock DOB: 9/11/72, Robert Feiock DOB: 1/13/71 for a total of $150.00 per month, payable on the 1st day of each month, the first payment to be due on or before July 1, 1984, and continuing thereafter

until said dependent(s) reach majority, become emancipated or until further order of the Court.

* * *

6. (X) These payments shall be made in the form of cashier's checks or money orders only, payable to COUNTY OF ORANGE, and mailed to Office of the District Attorney, Family Support Division, Post Office Box 448, Santa Ana, CA 92702. He/she shall place D.A. File No. 17-11-84 on each payment.

7. (X) Respondent is further ordered to advise the District Attorney's Office, Family Support Division, within 10 days, in writing, of every change of residence and every change of employment.

8. (X) OTHER ORDERS: *Temporary order of $50 pm/pc. and defendant ordered back on October 12, 1984, 9:00 a.m., Dept. 38 for further review. Defendant ordered to provide business financial record of that time.

* * *

10. (X) NOTICE: The Court has continuing authority to make an order increasing or decreasing the amount of the child support payments. The Respondent has the right to request that the Court order the child support payments be decreased or eliminated entirely.

* * *

ORDER

(X) The above is so ordered.

( ) The Court finds the Respondent has willingly, knowingly and intelligently waived his/her due process rights in agreeing to the entry of this judgment.

(X) The Respondent was served with a copy of this Order in open court.

(X) This Order also constitutes the Superior Court minute order.

/s/ Theodore E. Millard
Judge Of The Superior Court

Dated: 6/22/24

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

MARRIAGE OF

Petitioner: Alta Sue Feiock

Respondent: Phillip William Feiock

ORDER TO SHOW CAUSE AND DECLARATION FOR CONTEMPT

Case Number
40-07-51

(Filed March 5, 1985)

NOTICE!

A contempt proceeding is criminal in nature. If the court finds you in contempt, the possible penalties include jail sentence and fine.

You are entitled to the services of an attorney who should be consulted promptly in order to assist you. If you cannot afford an attorney, the court may appoint an attorney to represent you.

1. TO CITEE (Name): PHILLIP WILLIAM FEIOCK
2. YOU ARE ORDERED TO APPEAR IN THIS COURT AS FOLLOWS TO GIVE ANY LEGAL REASON WHY THIS COURT SHOULD NOT FIND YOU GUILTY OF CONTEMPT AND PUNISH YOU FOR WILLFULLY DISOBEYING ITS ORDERS AS SET FORTH IN THE DECLARATION BELOW AND REQUIRE YOU TO PAY, FOR THE BENEFIT OF THE MOVING PARTY, THE ATTORNEY FEES AND COSTS OF THIS PROCEEDING.

a. date: March 15, 1985 time: 9:00 a.m. in [X] Dept: 38

b. Address of court: 700 Civic Center Drive West
Santa Ana, CA 92701

Dated: 3/6/85 /s/ LUIS CARDENAS
Judge of the Superior Court

DECLARATION

3. Citee has willfully disobeyed certain orders of this court as set forth in this declaration.
   a. Citee had knowledge of the order in that (specify):
      He was present in court on June 22, 1984, and was served a copy of ORDER RE SUPPORT.
   b. Citee was able to comply with each order when it was disobeyed.
4. Based on the instances of disobedience described in this declaration, there have been
   a. [X] No prior applications
   b. [ ] Prior applications as follows (specify applications and dispositions):
5. Each order disobeyed and each instance of disobedience is described as follows
   a. [X] Orders for child support:

Date Due	Type of Order and Date Filed	Payable To	Amount Ordered	Amount Paid	Amount Due	
CURRENT SUPPORT						COUNTS
7/84	Order Re	County of Orange	$150.00	$ -0-	$150.00	1
10/84	Support	"	150.00	-0-	150.00	2
11/84	filed 6/22/84	"	150.00	-0-	150.00	3
12/84	"	"	150.00	-0-	150.00	4
1/85	"	"	150.00	-0-	150.00	5
2/85	"	"	150.00	-0-	150.00	6

Recapitulation of orders for:	Total Amount Ordered	Total Amount Paid	Total Amount Due
Child support	$900.00	$ -0-	$900.00

• • •

Total COUNTS CHARGED: SIX (6).....	$900.00	$ -0-	$900.00

b. [X] Injunctive or other order (Describe each order and disobedience with particuarity)

• • •

c. [X] Other material facts:
Total arrears accrued since the order of June 22, 1984, including arrears on contempt, is the sum of $900.00 through February 21, 1985.

I declare under penalty of perjury that the foregoing declaration, including any attachment, is true and correct and that this declaration was executed at (place): Santa Ana, California, on (date): 3/6/85.

MARC ROZENBERG, Deputy District Attorney

/s/ MARC ROZENBERG

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

MARRIAGE OF

Petitioner: ALTA SUE FEIOCK

Respondent: PHILLIP WILLIAM FEIOCK

ORDER TO SHOW CAUSE AND
DECLARATION FOR CONTEMPT

Case Number: 40-07-51

(Filed June 12, 1985)

NOTICE!

A contempt proceeding is criminal in nature. If the court finds you in contempt, the possible penalties include jail sentence and fine.

You are entitled to the services of an attorney who should be consulted promptly in order to assist you. If you cannot afford an attorney, the court may appoint an attorney to represent you.

1. TO CITEE (Name): PHILLIP WILLIAM FEIOCK
2. YOU ARE ORDERED TO APPEAR IN THIS COURT AS FOLLOWS TO GIVE ANY LEGAL REASON WHY THIS COURT SHOULD NOT FIND YOU GUILTY OF CONTEMPT AND PUNISH YOU FOR WILFULLY DISOBEYING ITS ORDERS AS SET FORTH IN THE DECLARATION BELOW AND REQUIRE YOU TO PAY, FOR THE BENEFIT OF THE MOVING PARTY, THE ATTORNEY FEES AND COSTS OF THIS PROCEEDING.

a. date: July 19, 1985 time: 9:00 in [X] Dept: 38

b. Address of court: 700 Civic Center Drive West
Santa Ana, CA. 92701

Dated: June 12, 1985

/s/ LUIS CARDENAS
Judge of the Superior Court

DECLARATION

3. Citee has willfully disobeyed certain orders of this court as set forth in this declaration.

a. Citee had knowledge of the order in that (specify):

The defendant was present in court on June 22, 1984, and was served with a copy of ORDER RE SUPPORT in open court.

b. Citee was able to comply with each order when it was disobeyed.

4. Based on the instances of disobedience described in this declaration, there have been

a. [ ] No prior applications

b. [X] Prior applications as follows (specify applications and dispositions):

filed March 5, 1985 (pending)

5. Each order disobeyed and each instance of disobedience is described as follows:

a. [X] Orders for child support, and/or reimbursement for prior child support expended:

Date Due	Type of Order and Date Filed	Payable To	Amount Ordered	Amount Paid	Amount Due	
CURRENT SUPPORT						Counts
03-85	Order re	County of Orange	$150.00	$ -0-	$150.00	1
04-85	Support	" " "	150.00	-0-	150.00	2
05-85	signed June 22, 1984	" " "	150.00	-0-	150.00	3

Recapitulation of orders for:	Total Amount Ordered	Total Amount Paid	Total Amount Due
Child support (CURRENT)	$450.00	$ -0-	$450.00
* * *			
Total THREE COUNTS CHARGED (3).....	$450.00	$ -0-	$450.00

b. [X] Injunctive or other order (Describe each order and disobedience with particularity)

* * *

c. [X] Other material facts:

Total arrears accrued since the order of June 22, 1984, including arrears on contempt, is the sum of $1,500.00 through May 1985.

I declare under penalty of perjury that the foregoing declaration, including any attachment, is true and correct and that this declaration was executed at (place): Santa Ana, California on (date): June 11, 1985.

MARC ROZENBERG, Deputy D.A. /s/ Marc Rozenberg

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 43

[caption omitted]

Honorable Donald A. McCartin, Judge presiding

Reporter's Transcript

August 9, 1985

• • •

[page 2]

The Court: What is the issue, gentlemen?

Mr. Licker: Whether or not Mr. Feiock is in contempt of a court order dated June the 22nd of 1984, Your Honor.

• • •

The Court: We will stipulate we have a lawful order . . . so the issue would be . . . His ability to comply, and whether he is in willful disobedience of the order; is that correct?

Mr. Licker: Yes, Your Honor. That's correct.

The Court: With that in mind, gentlemen, proceed.

[page 3]

Mr. Rozenberg: Your Honor, I'd request judicial notice of the file.

The Court: Okay . . .

Mr. Rozenberg: Your Honor, I'd request—I have a certified copy of the payment history. I've showed it to counsel. Like it to be admitted as People's 1.

• • •

[page 14]

Mr. Rozenberg: . . . Lydia Bailey, please.

The Court: You want to stand, please, be sworn.

LYDIA BAILEY,

called as a witness by the plaintiff, and being first duly sworn, was examined and testified as follows:

• • •

[page 19]

Q By Mr. Rozenberg: Thank you, Your Honor.

With respect to the payment history that you have in front of you, who is that payment history for—payor?

A It's for Phillip Feiock.

Q Referring to the payments that were made, can you determine from this payment history what payments were made?

A Yes, sir. There's been four payments made.

Q And what were those payments in? What amounts?

A There was a payment August 6 of '85 for $50; August 6 of '85 for $100; 9/21/84, $150; and 8/3/84, $150.

Q Now, with respect to months that are not on there, for example, October of 1984 through July of 1985, if there's no payment recorded in this computer, can you say that we did not receive any payments for those months?

A If we did not post it, that means we did not get it.

• • •

[page 21]

The Court: All right. Thank you, ma'am.

The printout will now be received. You rest at this time?

Mr. Rozenberg: Yes, we do rest, Your Honor.

The Court: Mr. Licker.

Mr. Licker: I renew the motion for nonsuit based on no evidence that there was an ability to pay during the alleged contempt period. Counsel has cited C.C.P. Section 1209.5 to the court. And if 1209.5 is good law, I think that counsel has made out a prima facie case, leaving aside any other objections that have been ruled upon.

However, I don't think that C.C.P. Section 1209.5 is valid law any more, and my basis for saying that is the case of People versus Roder . . . .

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. . . The reason why I would submit 1209.5 as no longer valid law, because it shifts the element—it presumes or instructs this court to presume an ability to comply with the order if the other elements are shown by adequate evidence.

And inasmuch as the procedural protections of a criminal case pertain here as well as they would in say a receiving stolen property case, I don't think the people can rely on 1209.5.

The Court: I will rely on it, Mr. Licker, and assume it's still good law until the appellate court adopts your argument.

As far as I know, I have always gone by 1209.5, the knowledge shifting the burden over to the defendant to go forward. Presume that the defendant has the ability with regard to dealing with the child support orders that's as I said come down through the ages.

So if they want to overrule it, they may, but I will assume it's still good law in spite of your analysis on the Roder matter.

And you may proceed.

Mr. Licker: I take it the motion is denied?

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The Court: Yes, sir.

Mr. Licker: Your Honor, Mr. Feiock would wish to testify at this time.

The Court: And you previously advised him of his constitutional rights and he's waiving them?

Mr. Licker: Mr. Feiock, you understand no one can make you testify in this case?

The Defendant: Yes.

Mr. Licker: And it is your wish to testify?

The Defendant: Yes.

The Court: Okay, sir. With that understanding, you may be sworn.

• • •

[page 25]

Q Now, did you pay in October of last year?

A No, I didn't.

Q And why did you not pay in October of last year?

A The partnership agreement that I had was unilaterally absolved [sic (dissolved)] by my partner. What she did was cut off my supply to market those products. In addition, she also went around to the accounts I was servicing and collected about close to $2500 worth of accounts payable to me and kept them herself.

And what I did at that time was put the inventory I had—try to start the business up on my own with the accounts that I had made on my own.

• • •

[page 26]

Q How did you try to pick up the business on your own after this happened in October?

A I had some inventory. I rented a garage, I had established because of my relationship with my partner, I was able to get some supplies on a 30-day basis where I didn't have to pay for them for 30 days. I rented a garage and started making products and servicing the accounts that I could.

Q How did that work out for the month of October?

A Not very well. I had trouble getting into my—best source of marketing, she kept about half of the accounts or more than half the accounts.

• • •

[page 27]

Q Did you make any payments in November of last year?

A No.

Q How was the business doing in November of last year?

A Not very well from a marketing standpoint.

• • •

[page 28]

Q Do you have before you any income and expense balance sheets from the business?

A I have January, February, and March.

• • •

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The Court: Let me ask a couple questions. To be sure we understand what we are doing here, looking at January . . . you've got income—in other words, you actually got in money where it says accounts, it's on the income side, so you got a total income looking in January of $1836.50. Is that correct?

The Witness: Yes.

The Court: Then shows income January swap meet, three weekends, $1200. Is that also income from the swap meet?

The Witness: Yes.

The Court: So you got a total of $3,036.50; correct?

The Witness: Yes.

• • •

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The Court: What was going on in October, November, and December? . . .

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The Witness: I was breaking just about even. . . .

The Court: . . . You showed January you lost $1342.

• • •

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The Court: So you had about a three or four hundred dollar profit in March then; is that right?

The Witness: Yes.

The Court: You may continue, gentlemen. Mr. Licker, go ahead.

Q By Mr. Licker: Mr. Feiock, at some point in time, did you lose the right to possess the garage in which you were working and residing?

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A That would have been at the end of March. I couldn't pay the rent on it any more.

• • •

A At the end of March, I did a small show at the Tyler Mall in Riverside, and put just about everything I had up there. It was a bust.

Q You lost money?

A I lost everything at that point. In the first—that's the point where I decided that after that show, I

was going to get out of the flower business, and that's what I—

The Court: Just liquidated everything?

The Witness: The materials that I had left from that show I sold them to what accounts that I could. And some of the other stuff I have it stored at a stable in Corona.

The Court: What did you do with the money you sold the stuff out of?

The Witness: With what money? I sold, I hardly sold anything. That was the problem. I paid what bills

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I could.

The Court: What bills did you pay?

The Witness: The growers that I had accounts with.

The Court: How much did you pay the growers?

The Witness: Well, I ended up—I still owe one of them about $2500 total.

The Court: How much did you pay them?

The Witness: About three or $400 each from the two. One was Milano's. I paid two hundred fifty, and two seventy-five to Roland's at the end of that show.

Mr. Licker: Now—

The Court: Let me ask—in February you made [sic (paid)] out for goods $1587 for the goods, is that right?

The Witness: Yes.

The Court: . . . then you paid out . . . Denise $3689 and in March you paid out only $423 in March, is that right?

The Witness: Well, this is just part of March. This only goes to the middle of March.

The Court: Okay.

* * *

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Q And did you begin working elsewhere in April of this year?

A Yes.

Q Where was that?

A Family Fire Safety.

Q Is that in Riverside?

A Yes. . . .

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CROSS-EXAMINATION

Q By Mr. Rozenberg:

* * *

[page 38]

Q You say you were renting a garage. . . . How much did that cost you?

A Thirty-five a month.

* * *

[page 39]

Q How much were you paying for the van?

A Two eighty-one.

Q How much were you paying for food?

A I didn't really keep a record of it.

Q Approximately every month. You can give me an estimate.

A Maybe two hundred to two fifty, in that area.

* * *

[page 42]

Q By Mr. Rozenberg: With respect to that—you were showing loss [in] all these months. Where was the money coming from to make the van payments before the van was repossessed and for your food payments? Did you have another source of income?

A. No. I was basically juggling figures. Juggling inventory and paying people late, that sort of thing . . .

Q Going back to these income and expense things,

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you were making these payments every month. When you say you broke down expense for goods and administration in February—those were payments you were actually making?

A Yes.

Q Income, you are showing a loss of $191 a month—or $191 for that month. Where did you have—where did

the extra $191 come from? You paid out more than you had?

A In that case, yes, would come out from inventory, reduction of inventory. Some months depending on what it is you would go lower, in some months higher.

• • •

[page 48]

The Court: Couple things that bother me, Mr. Licker. Of course, in October, he was supposed to complete job seeking forms and continue paying the temporary order.

In October 12th. Ordered back on November 16th. November 16th, he comes back in and the matter is continued over to the 22nd of February. He's also ordered to pay $150 a month on the first of each month till the next hearing, so when he's—something has to be going through somebody's mind. In other words, they reinforced, restated the order.

Seems to me, as I said—and his testimony is October, November, December he's breaking even—and also borrows a couple thousand dollars and clearly in March

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he has a pretty good surplusage for a few months, or for a few weeks, and he is making substantial income at the swap show.

I am going by the records. I'd be a little more impressed if he had bank account records in front of me. I have been around enough to know when he says he spent a couple hundred dollars to eat on and phone bills of $212,

and he's making van payments of almost three hundred a month—I think I'd be naive if I didn't gather inference that he was pulling money out of this.

Certainly not living high on the hog, but surviving.

If he was in court, he had that dire a problem, seems to me he's got a duty also if it's as grim as he says in three months surprisingly enough, he said he is breaking even, we don't have any records for that, but he's breaking even on those three months.

And we've got the records for the next three. I think it's a fair inference that he was surviving in some fashion, although not doing well, apparently.

• • •

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And I said I will find—as I said, that it was a lawful order. He had knowledge of the order, he had the ability to comply for the months of October, November, December of '84.

In March and April of '85—I think clearly those five months he had ability to comply, at least in some regard. He may pay [sic (has paid)] absolutely nothing. Clearly, I think the evidence there is sufficient to show that he was in contempt for those five periods, and find he willfully disobeyed the court order on those five dates.

The other contempts I will find he didn't have the ability. That will be dismissed.

At this time, I will find that he is in contempt on the five counts, to wit, October, November, December of '84,

and March and April of '85. And those particular five contempts I will sentence him to five days on each contempt, and be served consecutively, total of 25 days.

Mr. Licker: Could I be heard as to sentencing, Your Honor?

[page 51a]

The Court: No. Sentence be suspended, placed on three years informal probation, the following terms and conditions.

Number one, you make the payments as ordered. The thing that bothers me, as I said, I go to Winchell's every night and go in the service station every day, and go by all these places. Everybody is begging for work. There's no problem if you feel like you want to run a business of your own and do this on the side, but as I said, $150 is minimal as far as making the payments.

Certainly you can go out and pump gas and make enough in a weekend to make your payments. So seems to me certainly we've got to make these payments.

As I said, the three years informal probation that you [p]ay—the existing order of $150 per month and keep it current. If you get in difficulty, don't sit. Come to court and not say anything about it. If you are in trouble, get in here, let the court know about it.

Also find as I said—how much arrearage do we have?

Mr. Rozenberg: Your Honor—

The Court: Is it $900 or what is it?

Mr. Rozenberg: $1650 on this order.

The Court: Is there any dispute on the arrearage?

Mr. Licker: I'd have to compute that, Your Honor. Total arrearage through February 21st of '85 is nine hundred.

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and another hundred and fifty per month March, April, May, June and July. He's current for the month of August.

Mr. Rozenberg: It's another $750 plus nine hundred is sixteen fifty.

The Court: I will make a finding of $1650 subject to Mr. Licker, if he can come up with something different.

As far as the arrearage goes, commencing—okay, you working yet?

The Defendant: Yes, Your Honor.

The Court: Where?

The Defendant: Family Fire—

The Court: What are you earning?

The Defendant: Commission sales. Averaging about three, three hundred a week for the last three weeks or so, and it was about two hundred before that.

The Court: I am going to order $50 a month on the arrearage, starting October 1st, and $50 on each month thereafter. So starting October, kick up to two hundred a month on the arrearage. Don't let this slide, as I said, Mr. Feiock. I think you've got the ability to cut that order, and so part of the conditions of probation will be to start

making payments on the arrearage in October, and make your payments, keep them current now.

If you get into difficulty, get in touch. Remember, we've got 25 days hanging over your head, so don't screw up next time, because I am [an] easy mark the first time

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around, but the second time around I will send Mr. Licker along.

Mr. Licker: Just don't make me take my files. I will go without them.

The Court: Anything else, gentlemen?

Mr. Rozenberg: No, Your Honor. We will have the order prepared.

Mr. Licker: Could I have a copy of the transcript ordered to us?

The Court: If you want to order one, bill the Public Defender and give him a copy.

(End of proceedings.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE

In re the matter of Petitioner:
ALTA SUE FEIOCK

Case No. 40-07-51
Order
(Filed Aug. 9, 1985)

and Respondent:
PHILLIP WILLIAM FEIOCK

This cause came on regularly for hearing on August 9, 1985 in Dept. No. 43 before the Honorable Donald A. McCartin, Judge presiding, upon application from Cecil Hicks, District Attorney, County of Orange, for:

(X) Order to Show Cause (X) Re Contempt

• • •

Petitioner ( ) present (X) not present (X) represented by Atty. Marc Rozenberg

Respondent (X) present ( ) not present (X) represented by Atty. P. D. Mark Licker

(X) Respondent was served with a copy of this order in open court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

• • •

(X) Upon all evidence, and good cause appearing, respondent has wilfully disobeyed the order of the Court, having the ability to comply with said order.

(X) The (Court finds) that respondent owes as an arrearage, the sum of $1650.00 through 8-9-85. Respondent shall pay $50.00 per month, beginning 10-1, 1985, until paid. If any two payments are missed, whether consecutive or not, the entire balance shall become due and payable.

(1) (X) Respondent (is found guilty of) 5 counts of contempt, namely counts 2, 3, 4, 7, 8. Respondent is ordered to serve 5 days in Orange County Jail on each of 5 counts, consecutively, for a total of 25 days. Execution of sentence is suspended and respondent is placed on 3 years of informal probation to the court on the following terms and conditions:

(X) Respondent shall violate no laws or court order and shall pay $50.00 per month per child for a monthly total of $150.00 as and for child support, to be paid on the 1st day of each month commencing Aug. 1, 1985. Said payments are to continue at said rate for the term of informal probation. The respondent shall make payments on the arrearage as set forth above.

• • •

(4) (X) All payments are to be made by cashier's check or money order made payable to COUNTY OF ORANGE and mailed to Office of District Attorney, Family Support Division, Post Office Box 448, Santa Ana, CA 92702. Respondent shall place his DA file number 17-11-84 on each payment. Respondent shall notify the District Attorney, Family Support Division, in writing, within 10 days of any change in his business or residence address, providing said office with new address(es).

• • •

/s/ Donald A. McCartin,
Judge of the Superior Court

Dated: 08-09-85

PETITIONER'S

BRIEF

No. 86-787

In The
Supreme Court of the United States
October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF ALTA SUE FEIOCK,
Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR THE PETITIONER

Cecil Hicks, District Attorney
County of Orange, State of California
Michael R. Capizzi, Chief Assistant District Attorney*
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May, 1987

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or call collect (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER A VALID COURT ORDER FINDING THAT A PARENT HAS THE ABILITY TO SUPPORT HIS MINOR CHILD(REN) MAY, IN A CIVIL CONTEMPT PROCEEDING, CONSTITUTIONALLY JUSTIFY APPLICATION OF A REBUTTABLE STATUTORY PRESUMPTION THAT HIS SUBSEQUENT FAILURE TO DO SO IS WILLFUL, THUS REQUIRING THE CITEE TO CARRY A BURDEN OF PRODUCTION AS TO HIS INABILITY TO COMPLY WITH THE PRIOR ORDER FOR SUPPORT.

2. WHETHER CALIFORNIA COURTS MAY DISREGARD AND REFUSE TO FOLLOW THIS COURT'S LINE OF CASES DEALING WITH CIVIL CONTEMPTS, INCLUDING *UNITED STATES V. RYLANDER* [460 U.S. 752], THUS DEPRIVING CUSTODIAL PARENTS, WHOSE NONCUSTODIAL COUNTERPARTS ARE SELF-EMPLOYED AND "EXECUTION PROOF," OF THEIR CIVIL CONTEMPT REMEDY AND EVISCERATING THE STATE'S ABILITY TO ENFORCE CHILD SUPPORT OBLIGATIONS.

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No. 86-787

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vs.

PHILLIP WILLIAM FEIOCK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR THE PETITIONER

Petitioner, Cecil Hicks, District Attorney for the County of Orange, State of California, acting on behalf of Alta Sue Feiock as required by California Code of Civil Procedure (CCP) § 1680, respectfully urges this Honorable Court to reverse the decision of the California Court of Appeal, Fourth Appellate District, Division Three in this

case. The court below held CCP § 1209.5 unconstitutional on the ground that the statute creates a "mandatory presumption" within the meaning of *Ulster County Court v. Allen*, 442 U.S. 140 (1979), depriving contemnors of due process.

———o———

OPINION AND JUDGMENT BELOW

Respondent was directed to pay child support by Order of the Superior Court of the State of California, entered on June 22, 1984 (J.A. 15-17). After hearing, on August 9, 1985, Respondent was adjudged in contempt of that June 22, 1984 Order. (J.A. 39) The opinion of the California Court of Appeal, Fourth Appellate District, Division Three, is published as *In re Feiock* 180 Cal.App.3d 649 (1986). The opinion is reproduced at pages A1-A11 of the Appendix to the Petition For Writ of Certiorari. A copy of the Order issued by the California Supreme Court on August 14, 1986, denying Petitioner's Petition For Review is appended to the Petition For Certiorari at page B1.

———o———

JURISDICTION

The judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, declaring CCP § 1209.5 unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution, was entered on April 30, 1986. A timely Petition For Review was filed in the California Supreme Court on June 9, 1986, and denied on August 14,

1986. On October 23, 1986, execution and enforcement of the judgment of the California Court of Appeal was stayed pending issuance of the mandate of this Court, and the remittitur of the Court of Appeal was recalled by Order of Justice O'Connor, in chambers. *Hicks v. Feiock*, 479 U.S. — (1986).

A Petition For Writ of Certiorari was filed by Petitioner herein on November 12, 1986. Where the highest state court has jurisdiction to review a decision of a lower state court but refuses to do so, the time for petitioning for a Writ of Certiorari in the United States Supreme Court runs from the date on which the highest state court denies review. *American Railway Express v. Levee*, 263 U.S. 19, 20-21 (1923). Thus, the Petition, filed by Petitioner pursuant to 28 U.S.C. section 2101(c), was timely. Certiorari was granted on March 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

———o———

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, CCP §§ 1209.5 and 1672, 45 C.F.R. §§ 303.6, 303.7 and 305.100, California Civil Code (CC) §§ 196, 206, and 4700(a) and California Evidence Code (EC) § 604. These are set forth in pertinent part in Appendix A, infra.

———o———

STATEMENT OF THE CASE

Alta Sue Adams, of Ohio, and Phillip William Feiock married in Mexico on June 28, 1968. The couple subsequently settled in Orange County, California, and started a family. During their union, Alta bore Phillip three children: Douglas William, born December 18, 1969; Robert Martin, born January 13, 1971; and Jennifer Jean, born September 11, 1972 (J.A. 4).

Mr. Feiock left his family in January 1973. On July 2, 1974, Mrs. Feiock filed a Family Law Petition, number D85428, in the Superior Court of the State of California for the County of Orange, seeking dissolution of her marriage, legal custody of her three children and child support. On January 19, 1976, an Interlocutory Judgment of Dissolution Of Marriage was entered (J.A. 7-8) awarding custody of the children to Mrs. Feiock and ordering Mr. Feiock to pay $35.00 per month per child, a total of $105.00 per month for their support commencing February 1, 1976. The court further ordered that effective June 1, 1976, child support would increase to $75.00 per month per child for a total of $225.00 per month. The support order has not been modified and remains valid to date, although for the most part it remains unpaid (J.A. 13, 20, 23, 25, 35, 37).

When, on November 17, 1976, a Final Judgment of Dissolution of Marriage was rendered, Mrs. Feiock decided to return to her roots and moved her family back to Stark County, Ohio. Once there, she received sporadic child support payments from Respondent. By the end of December 1982, Respondent was substantially in arrears and had discontinued paying support altogether (J.A. 4). Realizing that she was powerless to persuade Respondent to contribute to the support of his own offspring, Mrs. Feiock sought the aid of her local state prosecuting agency to enforce her California decree. Upon receipt of Mrs. Feiock's request for assistance, the Stark County Prosecuting Attorney prepared and, on or about March 25, 1983, transmitted to Petitioner a Petition for ongoing child support and child support arrears under the Uniform Reciprocal Enforcement of Support Act of Ohio (Ohio Revised Code, sections 3115.01-3115.34) (J.A. 3-8).

On April 11, 1983 complying with the requirements of the California Revised Uniform Reciprocal Enforcement of Support Act (RURESA), Petitioner filed the Ohio Petition in the Orange County Superior Court (J.A. 3), case number 40-07-51, and Respondent was duly served with a copy thereof on October 19, 1983. Although Respondent succeeded in obtaining a number of continuances, hearing on the Petition was finally held in Superior Court on June 22, 1984.

The evidence adduced at the June 22, 1984 hearing included the January 1976 Dissolution Judgment in which Mr. Feiock was ordered to pay $225.00 per month for child support (R.T. 2:8-13). The court took judicial notice of the Dissolution Orders (R.T. 2:22-26) and pointedly informed Mr. Feiock that "[N]othing I'm going to do today is going to affect the $225.00 per month order . . . . So, the other Orange County Order for $225.00 per month goes on until it's modified by some other subsequent Order" (J.A. 13).

Mr. Feiock then testified that he had just become a partner in a business called Forever Flowers (J.A. 9-10). He also testified that the "business ha[d] been in existence

for about four years," and that, over that four-year period, the business had *netted* "about fifteen hundred to two thousand a month" (J.A. 10). Mr. Feiock explained that, while on paper his rent was $400.00 per month, he was not having to pay any rent because he was living with his business partner and "she picks up all the rent and everything . . ." except for "day to day . . . expenses" for gas and food (J.A. 11-12). He also stated that he was given extra money to cover his day to day expenses, about $10.00 each day (J.A. 12).

When asked how much he thought he could afford to pay for the support of his children while "he got his business going," Mr. Feiock hesitated, stating, "[when] people ask me for projected income . . . I really can't give an answer." Yet he went on to testify that he and his partner projected an average in gross sales of about $8,000.00 per month and anticipated an increase to $10,000.00 per month within six months (J.A. 13).

Mr. Feiock told the court later that his business had actually grossed about $7,500.00 in May 1984, and that the projected sales for June 1984, the month of the hearing, were $8,500.00 (J.A. 12). He estimated that, out of the $8,500.00 gross income, total expenses in June would run about fifty to sixty percent and further stated that, of the net, his partner was to get $2,500.00. While insisting that his share of the profit in May 1984 had only been $92.00 (J.A. 12), Mr. Feiock later maintained that his profit on $8,000.00 "would be about $1,200.00 . . . provided that expenses stay as they are" (J.A. 13).

After hearing, based on Mr. Feiock's projected income *and* actual past earnings of the business, and giving special weight to the June projection since it was already June 22 (J.A. 14), the court found that Respondent had the ability "to pay at least $50.00 per month per child" until he "[got] his business going" (J.A. 13-14). Accordingly, Respondent was ordered to begin making $150.00 monthly payments through the Office of the District Attorney, Family Support Division, commencing July 1, 1984 (J.A. 14).

So that it could resolve the issue of child support arrears and eventually conform its child support order to the level set in the Interlocutory Judgment of Dissolution (as required by CCP § 1691), the court expressly reserved jurisdiction over the alleged arrearage and ordered Mr. Feiock to return to court on October 12, 1984, for a review of his financial condition (J.A. 14). Respondent appeared in court as ordered on October 12, 1984, on November 16, 1984, and again on February 22, 1985. In the course of those appearances, no order terminating or modifying the June 22, 1984, support order was sought by Respondent, nor has such an order *ever* been sought.[1] Consequently,

---

[1]Note that "Respondent was served with a copy [of the June 22, 1984, support order] in open court" (J.A. 17) and was provided with written notice in the Order itself that "[t]he Court has continuing authority to make an order increasing or decreasing the amount of support payments." The notice concludes by advising Respondent that he "has the right to request that the Court order the child support payments be decreased or eliminated entirely" (J.A. 16). As the court observed at the conclusion of the contempt hearing on August 9, 1985, "Of course, in October, he was supposed to complete job seeking forms and continue paying the temporary order. In October 12. Ordered back on November 16th. November 16th, he comes back in and the matter is continued over to the 22nd of February. He's also ordered to pay $150.00 a month on the first of each month

(Continued on following page)

the June 22, 1984 Order continues to operate in full force and effect.[2]

By the time Respondent appeared in court on February 22, 1985, more than five months had passed since his last support payment (J.A. 20, 25). Because Respondent was self-employed and had no identifiable bank account or other assets concerning which subpoenas could be served or upon which execution could be levied, Petitioner served upon Respondent an Order to Show Cause re Contempt, pursuant to CCP § 1672, alleging six counts of contempt.[3] A second Order to Show Cause and Declaration For Contempt was filed by Petitioner on June 12, 1985, and subsequently served on Respondent, alleging an additional three counts of contempt. The two Orders to Show Cause were later consolidated for hearing.

On August 9, 1985, hearing was held on the consolidated Order to Show Cause in the Superior Court of the

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till the next hearing . . . In other words, they reinforced, restated the order . . . [S]omething has to be going through somebody's mind" (J.A. 34). Even so, although Respondent made no less than *three* court appearances between the date of the support order and the August 9, 1985 contempt hearing, he never availed himself of his right to decrease or terminate his support obligation.

[2]Rule 706(I), Rules of the Superior Court of Orange County, adopted effective July 1, 1984, stated: "Temporary orders for child support shall, unless otherwise specifically ordered, remain in full force and effect until further order of the Court." Effective January 1, 1987, Subsection (I) was relettered subsection (L).

[3]§ 1672 of the CCP, part of California's RURESA, expressly authorizes "a proceeding of *civil* contempt" to enforce duties of support falling within the purview of the Act. (Emphasis added.) A "criminal" contempt proceeding is *not* contemplated by the statute. § 1672 is set forth in full in Appendix A, infra.

State of California for the County of Orange. At the hearing, Petitioner proved the existence of a valid court order directing Mr. Feiock to pay child support, Mr. Feiock's knowledge of the order, and his failure to comply with the Order. Having established these three facts, proof of which, according to CCP § 1209.5 constitutes a prima facie civil contempt of court, Petitioner rested (J.A. 24-26).

After the presentation of Petitioner's case, Mr. Feiock's counsel moved the court for a nonsuit, arguing that CCP § 1209.5 is unconstitutional in that

> "... (I)t shifts the element—it presumes or instructs this court to presume an ability to comply with the order if the other elements are shown by adequate evidence. And inasmuch as the procedural protections of a criminal case pertain here as well as they would in say a receiving stolen property case, I don't think the People [sic] can rely on 1209.5" (J.A. 26).

> "[I]f 1209.5 is good law, *I think that counsel has made out a prima facie case* . . . (emphasis added). However, I don't think that C.C.P. Section 1209.5 is valid law any more, and my basis for saying that is the case of *People v. Roder* . . . [There,] the Supreme Court said that [in] any criminal prosecution, the prosecution [can] not rely upon a presumption such as that which shifts to the defendant the burden of raising the reasonable doubt or, in a similar fashion, shifts the burden to the defense on an ultimate element of the offense. And that's the reason why I would submit 1209.5 [is] no longer valid law" (J.A. 26).

The trial court responded,

> "I will rely on it, Mr. Licker, and assume it's still good law until the appellate court adopts your argument.
>
> As far as I know, I have always gone by 1209.5, the knowledge shifting the burden over to the defendant to go forward. Presume that the defendant has the ability with regard to dealing with the child support orders, that's, as I said, come down through the ages. So if they want to overrule it, they may, but I will assume it's still good law in spite of your analysis on the *Roder* matter. And you may proceed" (J.A. 26-27).

Respondent's counsel queried, "I take it the motion is denied?" And the court answered, "Yes, Sir" (J.A. 27).

Mr. Feiock then chose to testify and defend on the theory that he did not have an ability to pay his child support during the months in question (J.A. 27-34). On the stand, however, he admitted making regular monthly payments (J.A. 33) of $281.50 on a leased van (J.A. 33, 35; R.T. 30:18-21), spending between $200.00 and $250.00 per month for food (J.A. 33-34)[4] and paying over $200.00 for a month of telephone calls (J.A. 34; R.T. 30:10-14). Even during the months his records showed a net loss, he continued to make these monthly payments by "juggling figures" and reducing his inventory (J.A. 33-34). Respondent acknowledged that, during the months of October, November, and December 1984, he received enough in earnings to be "breaking just about even" (J.A. 30, 34) and, in March 1985, made "about a three or four hundred dollar profit" (J.A. 30, 33-34). Upon the liquidation of his inventory in March and April 1985, Respondent conceded, he realized additional income with which he "paid what bills [he] could" (J.A. 30-31). Finally, Respondent testified that he had gone to work for Family Fire Safety, a company in Riverside, California, in April 1985, doing commission sales work (J.A. 32).

[4]During his cross examination of Respondent, Mr. Rozenberg, counsel for Mrs. Feiock, inquired, "[T]hose were payments you were actually making?" Respondent replied, "Yes" (J.A. 33).

After hearing from Mr. Feiock's own mouth that he had earned income and that, in direct violation of CC § 4700(a), he had made payment on debts owed to creditors while *completely* disregarding the court's child support order, the trial court found Respondent in contempt of court, sustaining five of the nine counts of contempt alleged.[5]

The court reasoned:

> "Seems to me . . . [Mr. Feiock's] testimony in October, November, December he's breaking even—and clearly in March he has a pretty good surplusage . . . and he is making substantial income at the swap show. I am going by the records. I'd be a little more impressed if he had bank account records in front of me. I have been around enough to know when he says he spent a couple of hundred dollars to eat on and phone bills of $212, and he's making van payments of almost three hundred a month—I think I'd be naive if I didn't gather [the] inference that he was pulling money out of this . . .

[5]There is no ambiguity in CC § 4700(a), which requires that "[a]ll payments of support shall be made by the person owing the support payment [sic] prior to the payment of any debts [sic] owing to creditors."

> I will find—as I said, that it was a lawful order. He had knowledge of the order, he had the ability to comply for the months of October, November, December of '84 [and] March and April of '85 . . . *at least in some regard.* He [has paid] *absolutely nothing.* Clearly, I think the evidence . . . is sufficient to show that he was in contempt for those five periods, and find he willfully disobeyed the court order on those five dates. The other contempts . . . will be dismissed" (Emphasis added) (J.A. 34-35).

Respondent was consequently sentenced to 25 days in the Orange County Jail; however, sentence was suspended and Respondent was placed on three years informal probation to the court and ordered to begin making his child support payments or to prepare himself for incarceration. The court then explained the terms and conditions of probation, exhorting Respondent:

> "Number one, you make the payments as ordered. The thing that bothers me, as I said, I go to Winchell's [donut shop] every night and go in the service station every day . . . Everybody's begging for [people to] work. There's no problem if you feel like you want to run a business of your own and do this on the side, but as I said, *$150 [per month for the support of three children] is minimal* . . . [Pay] the existing order of $150 and keep it current . . . . I am going to order $50 a month on the arrearage, starting October 1st . . . Don't let this slide, as I said, Mr. Feiock. I think you've got the ability to cut that order, and so part of the conditions of probation will be to start making payments on the arrearage . . . If you get into difficulty, get in touch. Remember, we've got *25 days hanging over your head,* so don't screw up next time, because I am [an] easy mark the first time around, but the second time around I will send [your attorney] along.
>
> If you get in difficulty, don't sit . . . If you are in trouble, get in here, let the court know about it" (Emphasis added) (J.A. 36-38).

Four months after being held in civil contempt, on December 4, 1985, in lieu of complying with any of the trial court's orders and admonishments, Respondent filed a Petition for Writ of Habeas Corpus in the California Court of Appeal, insisting that the judgment of Contempt against him be reversed. Mr. Feiock argued that his motion for nonsuit at the August 9, 1985 hearing was improperly denied and that, as a result, the prosecution was relieved of its burden of proving what Respondent characterized as an "essential element" of the "crime" of civil contempt, Mr. Feiock's ability to comply with the June 22, 1984 support order.

Respondent contended that, in violation of the Fourteenth Amendment, CCP § 1209.5 creates an impermissible "mandatory presumption" as defined by this Honorable Court in *Ulster County Court v. Allen, supra, Sandstrom v. Montana,* 442 U.S. 510 (1979), and *Connecticut v. Johnson,* 460 U.S. 73 (1983), and by the California Supreme Court in *People v. Roder,* 33 Cal.3d 491 (1983). In his "Traverse To Order To Show Cause" filed in the Court of Appeal, Respondent also argued that,

> "[a]lthough the law is clear a contemner has both a Fifth Amendment right to silence and a right not to be called as a witness . . . the presumption operative in Code of Civil Procedure section 1209.5 will effectively compel the party paying child support to testify to the inability to comply with the court's order once

> the conditions precedent to Code of Civil Procedure section 1209.5 have been presented. [Footnote omitted.] There is no other alternative open to a contemner." (Traverse filed by Respondent Feiock in the Court of Appeal on or about March 3, 1986, page 13, line 17 through page 14, line 1.)

Respondent admitted, however, that "it is true that an erroneous ruling on a nonsuit is waived when the defendant in a civil action proceeds to establish the complained defect." (Traverse, page 14, lines 16-19.)[6]

On January 9, 1986, the Court of Appeal issued an Order to Show Cause to Petitioner, ordering the District Attorney to appear and explain why the judgment of contempt should not be set aside. Oral argument was held in the Court of Appeal on April 22, 1986. Thereafter, on April 30, 1986, the Court of Appeal issued a Writ of Habeas Corpus and annulled the August 9, 1985 judgment finding Mr. Feiock in contempt of court. Its opinion, contradicting all other California cases on the statute, held that CCP § 1209.5 is unconstitutional because it creates a "manda-

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[6]In his Traverse, Respondent correctly cited 7 Witkin, *California Procedure* 3d, Trial § 412, p. 414 (1985) for this proposition, the text of which reads, "If a nonsuit against the plaintiff is justified and erroneously denied, and thereafter the *defendant* supplies the missing evidence and thus remedies the defect in the plaintiff's case, the error is waived or cured, and there will be no reversal. (*Lowe v. San Francisco and Northwestern Ry. Co.* (1908) 154 C[al].A[pp].573, 576, 98 P.678; *Scouten v. Harding* (1925) 75 C[al].A[pp].382, 384, 242 P.739, *Housh v. Pacific States Life Ins. Co.* (1934) 2 C[al].A[pp].2d 14, 18, 37 P.2d 741.)" (Emphasis in original.)

tory presumption" which relieves the prosecution of proving all of the elements of the civil contempt "offense."[7]

On June 9, 1986, Petitioner filed a timely Petition For Review in the California Supreme Court. The Petition For Review was denied on August 14, 1986, with Justice Malcolm M. Lucas dissenting. (Appendix B to the Petition for Certiorari.) Remittitur was issued by the clerk of the Court of Appeal on August 26, 1986, and Petitioner's motion to recall the remittitur was denied by the Court of Appeal on October 6, 1986. On or about October 15, 1986, Petitioner filed an Application For Stay of Enforcement of Judgment with the clerk of this Court.

A temporary Stay and recall of the remittitur was granted on October 16, 1986, and, on October 23, 1986, the Stay was extended pending the filing of a Petition for Certiorari and the subsequent disposition of the case by this Honorable Court. A Petition for Writ of Certiorari was filed herein on November 12, 1986, and Certiorari was granted March 9, 1987.

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[7]The Court of Appeal opinion (Appendix A to the Petition for Certiorari) misstates the record to the effect that "Feiock's motion for judgment of acquittal under Penal Code section 1118 was denied . . . " *In re Feiock*, 180 Cal.App. 3d at 652 (1986). While referring to Respondent's motion as one for acquittal of criminal charges under the California *Penal Code* may fit neatly into the Court of Appeal's effort to mutate this civil contempt action into a criminal case, neither the *Penal Code* nor a "judgment of acquittal" was ever mentioned by anyone in the trial court or in the Court of Appeal, either in the briefs or at oral argument. The record, which was lodged with the Court of Appeal, clearly shows that Respondent moved the trial court for a *nonsuit* which, procedurally, is the proper motion in a *civil* action such as this one (J.A. 26).

SUMMARY OF ARGUMENT

The law of California is settled that in a contempt proceeding, inability to comply is an affirmative defense that must be raised by a citee as an excuse or justification to explain his failure to obey a prior valid court order. With respect to contempt proceedings initiated to enforce child support orders, the California legislature, in 1955, chose to codify a procedure which shifts the burden of producing evidence onto the citee as to any affirmative defense he desires to raise, including inability to pay, after the prosecuting party proves a prima facie contempt of court. Under CCP § 1209.5, a prima facie contempt is shown by proof of (1) a valid court order directing the citee to pay child support; (2) the citee's knowledge of the order; and (3) his noncompliance with the order.

CCP § 1209.5 has withstood previous constitutional challenge but was ruled unconstitutional by the court below on the ground that the statute creates a "mandatory presumption" which, by its operation, deprives alleged condemnors of their due process rights under the Fourteenth Amendment to the United States Constitution. The lower court found previous authority upholding the statute unpersuasive and felt compelled to declare the statute unconstitutional because of its reading of this Court's decision in *Ulster County Court v. Allen, supra,* and California authority applying it.

Ulster, however, was a *criminal* case, tried by jury, and its pronouncements about the use of presumptions in criminal jury trials are inapplicable to a civil proceeding such as the one before the Court in this case. Following the lead of federal precedent, California historically and

contemporaneously differentiates between criminal and civil contempt proceedings by examining the purpose for which a sentence is imposed. If sentence is imposed primarily to punish or vindicate the dignity or authority of the court, the proceeding is criminal. On the other hand, if the purpose of the contempt judgment is primarily to compel compliance with a lawful court order, the contempt is said to be civil.

In addition to the fact that California case law has expressly recognized that child support contempt proceedings in general are predominately civil in purpose, here, the purge provision of the instant contempt judgment and the comments of the trial judge at the time of sentencing provide convincing proof that the proceeding here at issue is a *civil* contempt. Thus, the criminal cases on which the lower court relied herein are inapposite. This Court has developed a completely separate line of cases dealing with civil contempts such as ours; *United States v. Rylander,* 460 U.S. 752 (1983), demonstrates the proper analytical approach. Its factual and procedural similarity to the instant case compels the conclusion that CCP § 1209.5 is constitutional.

While civil contempts in California have been termed "quasi-criminal," such description does not transform the contempt into a criminal case. That a proceeding is "quasi-criminal" means essentially that the proceeding must be conducted in strict compliance with the procedure required by statute. Here, the California legislature has elected to codify a procedure requiring a citee to carry a burden of producing evidence as to any affirmative defense he may wish to raise as an excuse for his noncompliance with a valid child support order, including his in-

ability to pay. Thus, although California may choose to require a higher standard of proof than federal law requires and may provide the benefit of counsel where federal law provides none, and though the alleged condemnor may have a *personal* Fifth Amendment right to remain silent during the contempt proceedings, these rights do not affect or transmogrify the affirmative defense of inability to pay into an element of the prosecution's proof.

Even *were* this case to be treated as a criminal proceeding, however, requiring the citee to raise his inability to comply as an affirmative defense does not violate the due process clause of the Fourteenth Amendment. *Ulster* allows that, within the catagory of "mandatory presumptions," certain presumptions may pass constitutional muster if they impose an extremely low burden of production on the defendant. In California, all that is required of a parent to refute the theory of his willful failure to pay is that he show diligent efforts to contribute to his children's support to the best of his ability. Thus, the burden of production is extremely low. And once the citee produces such evidence in a CCP § 1209.5 contempt proceeding, the presumption disappears, requiring the trial judge, as finder of fact, to weigh *all* the evidence presented by both sides and determine, without regard to the presumption, whether the citee is in contempt of court beyond a reasonable doubt.

An analogous statutory procedure in a *criminal* case was recently upheld by a majority of this Court in *Martin v. Ohio,* 480 U.S. — (1987). While the dissent in *Martin* objected to shifting the burden of production to the defendant where the affirmative defense served to negate an element of the crime, the dissent's objection appears to

have been based on the potential for jury confusion from such a process. Here, there is *no right to a jury,* and the trial judge must be presumed capable of applying the statutory procedure properly and fairly. Thus, the concerns expressed in the *Martin* dissent have no corollary in this case. Consequently, even were the contempt at bar viewed as a criminal proceeding, no due process violation is present.

Finally, there are few interests of greater import to the state than the proper discharge by parents of their duties to their children. The state has a compelling interest in ensuring that children receive the support they require from their parents rather than from programs shouldered by the taxpayers. Also, the state has been mandated by the federal government to enforce support obligations effectively and equally. If the lower court's ruling is not reversed, self-employed parents will for all practical purposes be exempted from application of the law, and Congress' entire legislative program for child support collection by the several states will be jeopardized. Accordingly, for all of the above reasons, CCP § 1209.5 must be found constitutional and the California Court of Appeal must be reversed.

ARGUMENT

CALIFORNIA'S STATUTORY SCHEME FOR ENFORCING CHILD SUPPORT OBLIGATIONS IS BOTH CONSTITUTIONAL AND INDISPENSABLE TO ADVANCING THE COMPELLING STATE INTEREST OF ASSURING THAT ALL PARENTS, INCLUDING THOSE WHO ARE SELF-EMPLOYED, PROVIDE THEIR CHILDREN WITH THE FINANCIAL SUPPORT TO WHICH THEY ARE ENTITLED UNDER THE LAW.

A. IT IS WELL ESTABLISHED IN CALIFORNIA JURISPRUDENCE THAT IN A CONTEMPT PROCEEDING, INABILITY TO COMPLY IS A MATTER OF AFFIRMATIVE DEFENSE ON WHICH THE CITEE HAS THE BURDEN OF PRODUCING EVIDENCE.

Before the Court of Appeal's decision in *In re Feiock*, it was a matter of hornbook law in California that inability to pay an order for child support was an affirmative defense to a contempt charge brought under CCP § 1209.5, and that "[t]he effect of [CCP § 1209.5, was simply] to place the burden of going forward upon the contemnor" as to all his affirmative defenses. It was held that the statute "does not shift the burden of proof to [the contemnor, but that the] latter burden remains with the party prosecuting the order to show cause." *Oliver v. Superior Court*, 197 Cal.App.2d 237, 242 (1961). As one commentator put it,

> "Under the provisions of Code of Civil Procedure, § 1209.5 . . . the strict requirement as to alleging facts to show ability to pay . . . in the affidavit [initiating the contempt proceeding] is eliminated. . . . The accused has the burden of going forward with the evidence. [Footnote omitted.] But the burden of proof does not shift to the accused."

> 4A Goddard, *California Practice: Family Law Practice* 3d, § 686, p.246 (1981) Accord: 14 Cal.Jur.3d, Contempt §§ 32, 71 (1974); 6 Witkin, *Summary of California Law* 8th Ed., Parent and Child § 137, p.4653 (1974)

In his authoritative treatise on California legal procedure, the venerable legal scholar, Bernard E. Witkin, writes similarly that "C.C.P. 1209.5 dispenses with the ordinary requirement that the petitioner in [her] affidavit, anticipate *the defense of inability to pay* by setting forth facts to show such ability. [Citations.]" (Emphasis added.) 8 Witkin, *California Procedure 3d, Enforcement of Judgement* § 337, p. 289 (1985). Thus, *before* section 1209.5 was enacted, it was a settled principle of law in California that inability to pay was part of the *defensive* arsenal; it was simply required that a petitioner "anticipate the defense" by enunciating certain "magic words" in her affidavit.

Prior to the enactment of § 1209.5, a petitioner's failure to recite the jurisdictional requisites in her affidavit could prove fatal to a finding of contempt. For instance, in *Warner v. Superior Court*, 126 Cal.App.2d 821 (1954), the court reversed a contempt judgment because the affidavit neglected to state an allegation "that petitioner willfully failed or refused to comply with the [prior] order." The court held that, in the absence of such an allegation, "[i]t was to be presumed that any failure to make payments as they matured was due to an honest belief on the part of [the citee] that he was not required to make them." *Warner, supra*, 126 Cal.App.2d at 826.

Because of the jurisdictional defect[8] in the petitioner's affidavit, the *Warner* panel reversed the lower court's judgment of contempt, noting that "there is no special procedure prescribed for the enforcement of [support] orders in domestic relations matters," and that, therefore, "there can be no relaxation of the rules which govern the exercise of the extraordinary powers of the court which are invoked." *Warner, supra,* 126 Cal.App.2d at 824-825. This observation by the *Warner* court was a clarion call to action. Within a year of *Warner's* publication, the California legislature passed legislation creating CCP § 1209.5,[9] which codified the "special procedure" found wanting in *Warner.*

Even *Warner,* however, does not dispute the proposition that inability to pay is an affirmative defense.[10] Re-

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[8] At the time of *Warner,* a sufficient affidavit was held to be a jurisdictional sine qua non for a valid contempt order. Accordingly, reviewing courts construed an affidavit with great strictness. Under CCP § 1211.5, affidavits in support of contempt proceedings are no longer so strictly construed. 8 Witkin, *California Procedure* 3d, Enforcement of Judgment, § 339, p. 290 (1985).

[9] Stats. 1955 ch. 1359 § 1

[10] Nor does *Nutter v. Superior Court,* 183 Cal.App.2d 72 (1960), cited incorrectly by the court below for the proposition that "the prosecution's burden of proof" necessitates its "proving an essential element of the case: the ability to pay." 180 Cal.App.3d at 653. The *Nutter* court *actually* wrote,

"The law is well established that it is not a contempt of court for a party to fail to pay a sum, however small, when it is not in his power so to do." Then addressing *not the burden* of the moving party *but the order* finding the citee in contempt, the court complained, "while finding that he 'wilfully failed to

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versal of the contempt judgment there was based solely upon the court's jurisdictional finding that the affidavit failed to state the accusation "with sufficent particularity to enable the accused to prepare his defense." *Warner, supra,* 126 Cal.App.2d 825. That inability to comply is an affirmative defense in California has been firmly established for well over a century. See: *Adams v. Haskell,* 6 Cal.316, 318 (1856); *Galland v. Galland,* 44 Cal.475, 478 (1872); *Ex Parte Spencer,* 83 Cal.460, 465 (1890); *Inre Pillsbury,* 69 Cal.App. 784, 788 (1924); *Bailey v. Superior Court,* 215 Cal.548, 551 (1932); *Donovan v. Superior Court,* 39 Cal.2d 848, 856 (1952); *Oliver v. Superior Court, supra; Lyon v. Superior Court,* 215 Cal.2d 446, 451 (1968); *Martin v. Superior Court,* 17 Cal.App.3d 412 (1971); and *Lyons v. Municipal Court,* 75 Cal.App.3d 829, 838 (1979).

In *Lyon v. Superior Court, supra,* the California Supreme Court unanimously upheld orders adjudging a defaulting parent in contempt, treating inability to pay not

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make' the payments . . . *the order of commitment contains no finding* that he has or at any time had the ability to pay . . . . A mere recital that such party wilfully failed to pay . . . is not equivalent of recital that it is within his power to comply . . . *and hence is insufficient to show jurisdiction to imprison him for contempt. A judgment of contempt must* not only specify the act to be performed, it must also *include a finding* that such act is within the power of the contemnor to perform. [Citations.]" 183 Cal.App.2d at 75. (Emphasis added.)

What *Nutter* addresses, then, similarly to *Warner,* are "magic words" which the trial court is required to recite in its judgment of contempt. In this case, those words *were* recited by the trial judge in his findings on the record: "I will find—as I said, that it was a lawful order. He had knowledge of the order, he had the ability to comply . . ." (J.A. 35) *Nutter* does not contradict the settled principle that inability to pay is an affirmative defense on which *the citee* has the burden of production.

as an element of the moving party's case in chief, but as an *affirmative* defense. As the Court pointed out:

> "We are of the opinion that unless a *defendant* shows he has complied with the court's order to the fullest extent of his ability his defense of inability fails. In other words, if this defendant was actually able to pay more than the $50 per month he has been paying, then *he has failed to show his inability* to comply with the order." (Emphasis added.)
>
> *Lyon v. Superior Court,* 215 Cal.2d 446, 451 (1968) Accord, *In re Lawatch,* 189 Cal.App.2d 646 (1961)

The California Supreme Court's explication of California law in *Lyon* revealed nothing new. It merely reaffirmed the principle, accepted for more than one hundred years, that a citee must be the one to raise his own *excuse* for not complying with the prior order of a competent court.

In *Galland v. Galland, supra,* the court determined with regard to a citee's ability to comply with a prior court order, that

> ". . . [I]nquiry may properly be had as to whether it is still in his power to do it, and if it be not, he should not be adjudged guilty . . . .
>
> In *Myers v. Trimble,* 3 E.D. Smith, 612, it is said: If it appear that the debtor is unable to pay the sum ordered to be paid, that may be deemed *a sufficient excuse when he appears to answer* for apparent contumacy." (Emphasis added.)
>
> *Galland v. Galland,* 44 Cal. 475, 478 (1872)

Thus, the law as settled in the State of California has *always* required a contempt citee to produce evidence on the question of his inability to pay. Inability is a defense, an *excuse,* not an "element" to be proven by the moving party. This established procedure is analogous to the procedure set forth in Penal Code (PC) § 1105, which requires a defendant in a murder trial to show "circumstances of mitigation, or that justify or excuse" a homicide.[11]

The unanimity of the foregoing authority speaks forcefully against transmogrifying the defense of inability into an element of Petitioner's burden of proof. Assuming *arguendo* the premise of the Court of Appeal that Petitioner had the burden of establishing Respondent's ability to pay, it is respectfully submitted that the court erred in discarding the Legislature's attempt to speak to the question in § 1209.5. Constitutionally, the section is unobjectionable.[12]

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11 California PC § 1105 has been properly applied, without constitutional attack, by the court below in *People v. Benway,* 164 Cal.App.3d 505, 513 (1985). Cf. this Court's recent opinion in *Martin v. Ohio,* 480 U.S. — (1987), discussed infra.

Also Cf. *People v. Beverly Bail Bonds,* 134 Cal.App.3d 906 (1982) which holds that . . . "[t]he failure of a defendant on bail to appear before the court is presumptively without sufficient excuse," and the . . . "burden of *rebutting* such presumption rests with the defendant's representatives." *Beverly Bail Bonds,* 134 Cal.App.3d at 911. The court further held that the "presumption against an absconder's disability furthers the public policy of inducing compliance with the requirement that accused criminals appear before the court when ordered . . . Placing on defendants or their agents the burden of producing evidence showing an excused absence is proper because *it is more reasonable to require the defendant or his surety to show disability than it would be to require the state to initially present evidence that the absconder was disabled." Beverly Bail Bonds,* 134 Cal.App.3d at 913.

12 Compare the discussion in *United States v. Fleischman,* 339 U.S. 349, 362-364 (1949); while there the majority was ap-

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To the extent that ability to pay a child support order has ever been discussed in terms of being an "element" of contempt, it has been held that proof of ability to pay at the time the order was made is legally sufficient to establish a prima facie contempt of court.

> "[I]nherent in an order for child support is a determination of a present ability to make the required payments. It seems reasonable to infer that more likely than not an ability will continue . . . Furthermore, one ordered to pay such support who for one reason or another finds himself, in whole or in part, unable to do so, is permitted to, and usually does, apply to the court for an appropriate modification of the order. *From a finding of ability to pay at the time of the order and the failure to seek its modification, inferences may reasonably be drawn that an ability to meet the ordered payments continues, thus establishing the statute's 'prima facie evidence of a contempt.'* " (Emphasis added.)
>
> *Martin v. Superior Court*, 17 Cal.App.3d 412, 415-416 (1971)

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plying a rule concerning the constitutionality of shifting the burden of proof in a criminal case, the language does have considerable vitality in the context of a civil contempt such as the one here involved: "In this situation, manifestly, the prosecution is under a serious practical handicap if it must prove the negative proposition—that the respondent . . . had no good reason for failing to try to comply with the subpoena insofar as she was able . . . On the other hand, the burden of the affirmative was not an oppressive one for respondent to undertake; the relevant facts are peculiarly within her knowledge. *She was called upon merely to introduce* evidence as to what steps she took after receiving the subpoena, or, if she took no action, any *evidence tending to excuse her omission.* [W]e think that under the circumstances here presented *the burden was upon her to present evidence to sustain such a defense.*" (Emphasis added.)

Martin v. Superior Court appears to have been the first published case to rule directly on the constitutionality of CCP § 1209.5. When, in *Martin,* the statutory scheme was subjected to constitutional attack on Fifth and Fourteenth Amendment grounds, the Court of Appeal, First Appellate District, found no constitutional infirmity in the statute.

In its opinion, however, the court below found *Martin* to be "unpersuasive, mainly because it predated [*People v.*] *Roder,* [33 Cal.3d 491] and the United States Supreme Court decisions *Roder* relied on." *In re Feiock,* 180 Cal. App.3d 654-655.[13] The *Martin* court had relied on *Tot v. United States,* 319 U.S. 463 (1943), *Leary v. United States,* 395 U.S. 6 (1969) and *People v. Stevenson,* 58 Cal.2d 794 (1962), and since *Tot* and *Leary,* with which *Stevenson* is in accord, have been expanded and refined since *Martin* was penned, the *Feiock* court's finding as regards the constitutional analysis in *Martin* has some surface credibility to it. But the analysis breaks down if the *Martin* court's reliance on *Tot* and *Leary* was unnecessary in the first instance. And it was.

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[13] The Court of Appeal relied both on *Ulster County Court v. Allen,* 442 U.S. 140 (1979) and *People v. Roder,* 33 Cal.3d 491 (1983). *Roder,* a criminal case tried by jury, was *wholly* based upon *Ulster County Court v. Allen,* and the California Supreme Court stated no independent ground for its decision. Cf. *California v. Beheler,* 463 U.S. 1121, 1123, footnote 1 (1983): "Beheler suggests that the decision below rested upon adequate and independent state grounds in that the court applied state 'in custody' standards . . . It is clear from the face of the opinion, however, that the opinion below rested exclusively on this court's 'decision on the *Miranda* issue' . . . . Although the court relied in part on *People v. Herdan,* 42 Cal.App.3d 300, 116 Cal. Rptr. 641 (1974), that decision applied *Miranda.*" Similarly, *Roder* applies *Ulster.* Cf. *Michigan v. Long,* 463 U.S. 1032, 1040-1041, 1044 (1983).

Apparently the Court of Appeal in *Feiock*, without inquiring further, simply assumed that the *Martin* court's reliance on the *Tot* line of cases was correct, and the authoritative language of *Martin* serves only to encourage such an assumption: "[s]ince *Tot, Leary* and *Stevenson unquestionably* state the applicable constitutional principles," the *Martin* court declared, "our immediate task is to determine whether section 1209.5 conforms to the standards there announced." (Emphasis added.) *Martin*, 17 Cal.App.3d at 415. Unfortunately, the *Martin* court reached the right result, but it did so by using the wrong reasons.

When *Martin* was written, eight years before *Ulster County Court v. Allen, supra,* the test for the validity of a presumption in a *criminal* case required only that the presumed fact be "more likely than not to flow from the prove[n] fact on which it is made to depend." *Leary*, 395 U.S. at 36. Petitioners in the *Martin* case contended that § 1209.5 failed to comport with that test, and, as authority, they cited to the court *Tot* and *Leary*. The court then validated § 1209.5 by fitting it to the requirements of those cases. However, by doing so the *Martin* court analyzed the statute's constitutionality by using a test that had been designed to assist juries in dealing with the use of presumptions in *criminal* cases. In doing so, the court erred.

Though it correctly determined that CCP § 1209.5 is constitutional, the *Martin* court reached that result by way of the wrong test and faulty analysis which has gone unchallenged and uncorrected for sixteen years. And now, because the Court of Appeal in *Feiock* has taken it for granted that the *Tot* and *Leary* line of cases applies, the mistake of *Martin* has become the failure of *Feiock*, a failure that threatens the well being of children throughout the United States.

B. THE CONTEMPT ACTION IN THE PRESENT CASE HAS A PREDOMINANTLY CIVIL PURPOSE AND IS NOT SUBJECT TO ALL THE REQUIREMENTS OF A CRIMINAL PROCEEDING.

Both *Ulster County Court v. Allen, supra,* and *People v. Roder, supra,* are direct descendants of *Tot v. United States, supra. Tot* was the first in a line of this Court's cases to articulate a due process test by which presumptions in *criminal* cases are to be evaluated. That line of cases includes *United States v. Gainey*, 380 U.S. 63 (1965), *United States v. Romano*, 382 U.S. 136 (1965), *Leary v. United States, supra, Turner v. United States*, 396 U.S. 398 (1970), *Barnes v. United States*, 412 U.S. 837 (1973), *Ulster County Court v. Allen, supra, Sandstrom v. Montana, supra, Connecticut v. Johnson, supra,* and *Francis v. Franklin*, 471 U.S. 307 (1985).

All of the cases in the *Tot* line are *criminal* cases in which presumptions concerning criminal intent and problematic *jury* instructions are involved. Although a child support contempt proceeding has sometimes been referred

to as "quasi-criminal" in nature[14] because of the potential consequences that a judgment of contempt can have (*Oliver v. Superior Court, supra,* 197 Cal.App.2d at 239-240 (1961)), the better analysis seems to be that adopted by California appellate courts, in reliance upon this Court's distinction between criminal and civil contempts. This approach is exemplified by *People v. Derner,* 182 Cal.App.3d 588 (1986) and *People v. Batey,* 183 Cal.App.3d 1281 (1986).

In *Derner,* defendant wrongfully concealed his four-year-old daughter from her mother for over four years by taking her out of the state. When he and his daughter were returned to California, he was held in contempt for violating the court order awarding the wife custody and was subsequently charged with a criminal violation of PC § 278.5. The argument that the contempt order prohibited a § 278.5 prosecution because of double jeopardy was rejected by the Court of Appeal, which explained:

> "Thus, in *Shillitani v. United States* (1966) 384 U.S. 364, 379 [16 L.Ed.2d 622, 627, 86 S.Ct. 1531], the United States Supreme Court set forth the following

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[14] That civil contempt proceedings are denominated "quasi-criminal" simply means that the "proceedings must be conducted in strict compliance with the statutory procedure." *Powers v. Superior Court,* 253 Cal.App.2d 617, 619 (1967). Under § 1209.5, the procedure mandated by the legislature requires a citee to carry a burden of production as to any affirmative defense he may wish to raise to excuse or justify his noncompliance with the prior support order. Thus, while Respondent may be correct in asserting that "[t]he decisions . . . enforcing the application of due process and Fifth Amendment standards to civil contempts are legion" (Opposition to Certiorari, p. 6), such does not transform the defense of inability into an element of the prosecution's proof.

> test: '[W]hat does the court primarily seek to accomplish by imposing sentence?' If the purpose of the sentence is to vindicate the dignity or the authority of the court, then the proceeding is criminal. (*People v. Lombardo,* (1975) 50 Cal.App.3d 849, 852 [123 Cal. Rptr. 755]; 7 Witkin Cal. Procedure (3rd ed. 1985) Trial, Section 176, pp. 172-173.) If, on the other hand, the sentence is intended to protect and enforce the right of private parties by compelling obedience to court orders and decrees, then the proceeding is said to be civil. (*Morelli v. Superior Court* (1969) 1 Cal.3d 328, 333 [82 Cal.Rptr. 375, 461 P.2d 655]; *People v. Lombardo, supra,* 50 Cal.App.3d at pp. 852-853; 7 Witkin, *supra* § 175, p. 172.) In other words criminal contempt *punishes* whereas civil contempt *coerces.*"
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> *People v. Derner,* 182 Cal.App.3d 588, 592

The facts of *Batey* are similar to those of *Derner.* The *Batey* majority observed:

> "*State and federal* case law clearly distinguish criminal and civil contempts. '[W]here the object of the proceeding is to vindicate the dignity or authority of the court, they are regarded as criminal in character even though they arise from, or are ancillary to, a civil action. [Citation.]' (*Morelli v. Superior Court* (1969) 1 Cal.3d 328, 333 . . . .) ' . . . [C]ivil contempt, as contrasted with criminal contempt, has traditionally been viewed as non-punitive, for its purpose is only to compel compliance with a lawful order of the court; . . . ' (*In re Lifschutz* (1970) 2 Cal.3d 415, 439, fn. 27 . . . .) *Federal law is to the same effect . . .* (*United States v. Asay* (9th Cir. 1980) 614 F.2d 655, 659.)"
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> *People v. Batey,* 183 Cal.App.3d 1281, 1284-1285 (1986)

After performing a case by case analysis of *Colombo v. New York,* 405 U.S. 9 (1972); *Yates v. United States,* 355 U.S. 66 (1957); *Cheff v. Schnackenberg,* 384 U.S. 373

(1966); *Shillitani v. United States,* 384 U.S. 364 (1966); and *Oriel v. Russell,* 278 U.S. 358 (1929) the *Batey* court summarized:

> "The following guidelines emerge from the United States Supreme Court cases. A criminal-punitive contempt order is one which imposes punishment even though the offender offers to purge himself of the contempt, or even though future compliance with the order is no longer necessary. In contrast, a civil-coercive contempt order is one which, *although it may have punitive aspects,* has as *its main purpose the coercion of compliance* with the court's order." (Emphasis added.)
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> *People v. Batey, supra,* 183 Cal.App.3d at 1288 (1986)

Although the order of commitment for contempt in *Batey* included "a flat fifteen-day" sentence along with a $3000.00 fine, "stayed for . . . one year on the condition that . . . respondent comply with all court orders . . . ," the majority determined the contempt to be "predominately civil." 183 Cal.App.3d at 1289. It noted that, as compared with the facts of *Derner,*

> "the facts of this case more strongly support the conclusion the proceedings were civil since the trial judge's order here was stated wholly in terms of complying with the family court's order and did not contain . . . mixed probationary and civil-coercive language." 183 Cal.App.3d at 1289.

But, even in *Derner,* where the trial court suspended execution of the sentence using the standard probationary language "violate no laws [sic]" along with an order "not to violate any other court orders [sic] in this file for a period of one year," the Court of Appeal found sufficient proof that the primary purpose of the commitment order was coercive. *Derner, supra,* 182 Cal.App.3d at 592. Both

the *Derner* and *Batey* opinions concluded that the respective contempt adjudications were *civil* in purpose and did not invoke the jeopardy provisions of the United States or California Constitutions so as to bar prosecution under PC § 278.5.

While Respondent in the instant case was given a flat 25-day sentence, it was *suspended* to provide him with an opportunity to purge his arrears and prove to the court that he was willing to share in the responsibility of supporting his three children. This is clear not only from the purge provision in the judgment itself (J.A. 39) but also from the trial judge's final comments to Respondent at the conclusion of the hearing:

> "If you get into difficulty, get in touch. Remember, *we've got 25 days hanging over your head,* so don't screw up next time . . . " (Emphasis added) (J.A. 38).

The procedure utilized by the trial judge, suspending sentence and placing the contemnor on informal probation, not only allowed the trial court to retain jurisdiction over the Respondent for the ensuing three years to secure his compliance with the support orders, it was in accord with settled practice:

> "Where the party cited asserts his ability and willingness to pay whatever is found due, the long established practice of our courts is to fix a time within which payment must be made and not send the delinquent to jail forthwith."
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> *Warner v. Superior Court, supra,* 126 Cal.App.2d 821, 827 (1954)

Derner and *Batey* show that California makes the same distinctions between civil and criminal contempts as

does the federal precedent upon which they rely.[15] Further, where child support is concerned, it is widely recognized in California that all contempt proceedings in such cases have a civil purpose:

> "A proceeding in contempt for failure to pay . . . support money is *primarily* a method of collecting money that cannot be realized through execution process. It is *a coercive measure designed to compel obedience to the court's orders* rather than one to vindicate the authority of the court by inflicting punishment." (Emphasis added.)
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> *Warner v. Superior Court, supra,* 126 Cal.App.2d 821, 824-825 (1954)

Indeed, 45 CFR § 303.6(a) *requires* California to initiate "contempt proceedings *to enforce* . . . extant court order[s]," not to punish people. Therefore, if the instant contempt did not have a civil purpose, as the court below has at least implicitly held, California is out of compliance with the federal mandate and subject to the penalties set forth in 45 CFR § 305.100.

Accordingly, in applying the above criteria, it is clear that the contempt judgment in the case at hand was indubitably *civil* in its purpose. Its principal object was, obviously, to *coerce* the payment of child support rather than to punish. *Consequently, the California Court of Appeal's reliance upon the Ulster line of criminal cases is erroneous.* That line of cases cannot serve as authority

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[15] *Mitchell v. Superior Court,* 43 Cal.3d 107 (1987), cited by Respondent in his Opposition to Certiorari, could have taken California down another path; however, the California Supreme Court granted a rehearing in *Mitchell* on March 26, 1987, which is, at this writing, pending.

for an analytical framework dealing with civil contempt citations such as the one at issue here. This Honorable Court has developed a *completely separate* mode of analysis to deal with civil contempts, excluding them from the *Ulster* line of cases. *United States v. Rylander, supra,* represents that line of cases dealing with contempts such as ours.

C. REQUIRING A CITEE TO PRODUCE EVIDENCE SHOWING HIS INABILITY TO COMPLY WITH A PRIOR SUPPORT ORDER IS CONSTITUTIONAL.

In *Rylander,* a case decided nearly four years after *Ulster* and two months after California's *People v. Roder, supra,* this Court reviewed the plight of Richard Rylander. Rylander, the President of Rylander and Co. Realtors, was served with a summons pursuant to 26 U.S.C. § 7602, ordering him to appear before an agent of the Internal Revenue Service and to produce for examination, and testify with respect to, books and records of two of his corporations. When Rylander failed to comply with the summons, the United States District Court issued an enforcement order. *Rylander neither sought reconsideration of the enforcement order, nor did he appeal from it.* He finally appeared before the IRS agent; however, he failed to produce the required records. As a consequence, the District Court issued an order to show cause why Rylander should not be held in contempt of court.

When, at the hearing, Rylander invoked the Fifth Amendment privilege against compulsory self-incrimination and *refused to present any* other competent evidence in support of his claim that he did not possess the records

in question, the District Court held Rylander in contempt. In so doing, the Court utilized a presumption: after affirmatively finding that Rylander was in fact the president of the two involved corporations, and that, thus, he had constructive possession and control over the corporations' books and records, the court presumed that Rylander had it within his present ability to produce the required documents. The District Court further held that Rylander had the *burden of producing evidence* with respect to his inability to comply with the court order. And, since Rylander refused to shoulder the burden of producing *any* evidence, the District Court inferred that Rylander's disobedience to the subpoena was willful and contemptuous. Rylander was, thus, "faced with a *civil* contempt order directing him to either *produce* the subpoenaed records *or face imprisonment.*" (Emphasis added.) *Rylander,* 460 U.S. at 755.

The Court of Appeals for the Ninth Circuit reversed. It "emphasized that the enforcement proceeding was summary in nature, that the Government's burden was light, and that there had been no express finding in the [initial] enforcement proceeding that Rylander was [actually] in possession or control of the records." *Rylander,* 460 U.S. at 756. Thus it held that Rylander's invocation of the privilege against compulsory self-incrimination required that the *Government* go forward with evidence *to prove* Rylander's present ability to comply with the court order to produce documents. In response to this reasoning, which strikes Petitioner as sounding familiar, this Court reversed the Court of Appeals.

In an eight to one decision, this Honorable Court held that, for the purpose of a finding of contempt, Rylander's

ability to comply with the order for production had been sufficiently established by the initial District Court enforcement order from which Rylander had not appealed. Second, the Court found *no fault,* constitutional or otherwise, in the District Court's use of the rebuttable presumption of continuing possession. And finally, the majority agreed with the District Court that inability to comply with the initial order was a matter of affirmative defense concerning which Rylander had the burden of producing evidence. As the majority reasoned:

> "Rylander . . . was held in contempt for failure to comply with a previous order of the District court enforcing an IRS summons against him. *This order, unappealed from, necessarily contained an implied finding* that no defense of lack of possession or control had been raised and sustained in the proceedings. The only issue open to Rylander in *defending the contempt* proceeding *was to show inability to then produce,* and because of the *presumption of continuing possession arising from the enforcement order, Maggio v. Zeitz,* (1948) 333 U.S. 56, 92 L.Ed. 476, 68 S.Ct. 401, *if he sought to defend on that ground he was required to come forward with evidence in support of it.* The fact that his refusal to come forward with such evidence was accompanied by a claim of Fifth Amendment privilege may be an adequate reason for the Court's not compelling him to respond to cross-examination at the contempt hearing [footnote omitted], but the claim of privilege is not a substitute for relevant evidence [that would assist in meeting a burden of production]."
>
> *United States v. Rylander,* 460 U.S. 752, 760-761 [758] (1983)

The scenario in *Rylander* is strikingly similar to that of *Feiock* and to that which occurs in child support contempt proceedings daily throughout our nation. In each

case, there is an initial order in which there is a finding of ability to pay. In each case, one who disagrees with the court's findings can appeal and, in a child support case, can later move the court for a modification based upon a change of circumstance, the significance of which was emphasized in *Martin v. Superior Court, supra.* In each case, failure to appeal or to seek modification of the initial order raises a rebuttable presumption of continued ability to comply with the order. And in each case, when an order to show cause re contempt is adjudicated, inability to comply can be raised by the Respondent as an affirmative defense. Finally, in each case, if a citee refuses to go forward with the evidence concerning his defenses, he may constitutionally be imprisoned for contempt of court.[16] *Rylander* is, thus, instructive as regards both the propriety and the constitutionality of shifting the burden of production to the Respondent in this case.

Of course, in view of the fact that Rylander was faced with imprisonment, this Court *could* have ignored or blurred the distinctions of precedent and decided to describe "ability to comply" with the court order as an element of a

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16 In California, "[t]he question of whether or not disobedience of the order for the payment of [support] is contempt which may be punished by imprisonment . . . is no longer an open one . . . [T]he court may . . . enforce compliance with the order by imprisonment for contempt (*Ex Parte Perkins,* 18 Cal.60; *Ex Parte Cottrell* [59 Cal.417]; and the husband may purge himself of contempt by showing that he is unable to obey the order . . . The order . . . is subject to review . . . but until reversed it must be obeyed, or the party must purge himself of contempt by showing his inability to pay it . . . ." *Ex Parte Spencer, supra,* 83 Cal.at 465-466.

crime that the "prosecution"[17] must prove beyond a reasonable doubt[18] while the Rylanders and Feiocks of this world "sit on their hands"[19] or snicker up their sleeves. But this Court declined to "convert the privilege [claimed by Rylander] from the shield against compulsory self-incrimination which it was intended to be into a sword

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17 Often, the "prosecution" is not the District Attorney but a single parent, too poor to pay for an attorney, acting in propria persona, who might not be in court at all, much less without counsel, if she had the money to feed her children without their father's assistance.

18 After noting the procedural similarity of enforcement proceedings concerned with alimony orders and those dealing with bankruptcy, in which citees must carry burdens of production as to evidence of their inability to comply with prior orders of court, Chief Justice Taft wrote for the court in *Oriel v. Russell,* 278 U.S. 358, 365-366 (1928), quoting the late circuit Judge McPherson of the third circuit: "[A]s the order to pay . . . stands without sufficient reply, it remains what it has been from the first—an order presumed to be right, and therefore an order that ought to be enforced . . . [T]he court may believe the bankrupt's assertion that he is not now in possession or control of the money . . . but it is also true that the assertion may not be believed; and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be . . . [I]mprisonment for debt has ceased, but imprisonment *to compel obedience to a lawful judicial order* . . . has not yet ceased and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees." (Emphasis added.)

19 The Court of Appeal opined that, "despite [his] continuing obligation to comply, Feiock 'may literally sit on his hands' and defend any contempt allegation by relying on the prosecution's burden of proof; its burden to affirmatively show, beyond a reasonable doubt, his ability to comply with the order, to wit, his ability to pay." *In re Feiock, supra,* 180 Cal.App.3d at 654. The court below has affirmed that approach in subsequent cases, leaving Respondent's three children, and others like them, to eat cake.

whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Rylander,* 460 U.S. at 758.[20]

The *Rylander* majority further cited *Maggio v. Zeitz,* 333 U.S. 56, 69 (1948), wherein it was observed:

> "It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience."
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> *United States v. Rylander,* 460 U.S. 752, 756-757 (1983)

In the context of the *Feiock* case, sadly, by requiring the party prosecuting the contempt essentially to relitigate the issue of ability to comply, *although, this time, without the right to call Respondent to the stand,* the opinion of the court below does nothing if not "foster experimentation with disobedience." Where the party seeking the judgment of contempt must prove, beyond a reasonable doubt, the actual income, expenses, ability to work and so forth of a self-employed parent such as Feiock, who apparently

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20 In his "Traverse To Order To Show Cause" filed in the court below, Respondent contends that § 1209.5 "effectively compel[s] the party paying child support [that is a misnomer—since that party does not pay] to testify . . . There is no alternative open to a contemnor." [Traverse, 13:17-14:1.] Respondent's options, however, are not so limited. He could submit business or bank records, have coworkers, neighbors or family testisfy on his behalf and use other evidence without ever getting off his hands and onto his own two feet. CCP § 1209.5 causes no Fifth Amendment deprivation. Cf. *United States v. Doe,* 465 U.S. 605, 610-611, 618 (1984) and *Miller v. Superior Court,* 71 Cal.App.3d 145 (1977).

avoids financial institutions and the reporting of assets or income to any agency that otherwise might be served with a subpoena, it will be *impossible* to carry the burden of proving ability to comply. Thus, if the Court of Appeal's decision is not reversed, the law will operate to encourage the continued secretion of financial information, noncompliance with court orders and the inevitable family distress associated with a parent's failure to pay support.[21]

The number of cases in which such an odious result will be manifested could approach the proportions of a plague. And in such cases where civil contempt has been the remedy of last resort, as in the case at bar, the remedy will be decimated. However, the facts in the instant case closely parallel the facts in *Rylander,* and the rationale of *Rylander* compels the conclusion that the statute here involved is constitutional. Therefore, the judgment of the Court of Appeal should be reversed and the judgment of contempt, reinstated.

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21 In signing the 1984 Child Support Enforcement Amendments into law (42 U.S.C. § 657 et seq.), President Reagan remarked, "The failure of some parents to support their children is a blemish on America. As a decent and caring people, it behooves us to come to grips with the devil-may-care attitude of some of our citizens that has left too many children in dire straits. Permitting individuals to ignore parental obligations and giving the bill to the taxpayers in the form of higher welfare costs have been tantamount to a stamp of approval. And *this is not the kind of message public policy should be sending out."* (Emphasis added.) 20 Weekly Comp. Pres. Doc. 1125, 1126 (August 16, 1984).

D. REQUIRING A CITEE TO RAISE HIS INABILITY TO COMPLY WITH A PRIOR SUPPORT ORDER AS AN AFFIRMATIVE DEFENSE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, EVEN IF THE CONTEMPT HEARING IS TREATED AS A CRIMINAL PROCEEDING.

Were *Ulster* and *Roder properly* applied to a § 1209.5 proceeding, and assuming for the sake of argument that the statute does create a "mandatory presumption," *Ulster* and *Roder* both recognize that, within the category of mandatory presumptions, certain presumptions may be constitutionally permissible "[t]o the extent that [they] impose [] an extremely low burden of production—e.g. being satisfied by 'any' evidence." *Ulster,* 442 U.S. at 158, fn.16; *People v. Roder,* 33 Cal.3d at 500, fn.10. In California, as one court has put it in the context of PC § 270 criminal nonsupport action,

> "A man is expected to neither steal nor beg in order to supply his children with the necessities of life. *All that is required to refute the theory of wilful failure to supply the necessaries of life* is that a man shall honestly seek for employment and diligently perform his service to the best of his ability, contributing all that he can reasonably spare for the maintenance of his children." (Emphasis added.)
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> *People v. Caseri,* 129 Cal.App. 88, 92 (1933) Accord: *Nutter v. Superior Court, supra,* 183 Cal.App.2d at 75.

Thus, the threshold showing a citee is required to make to excuse his failure to comply with a prior support order is minimal. And, as the trial judge below pointed out, so is the level at which Respondent's payments have been set. (J.A. 36)

Moreover, the *Ulster* majority states that if such a permissible "presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the [rational connection] test described in *Leary.*" *Ulster,* 442 U.S. at 167. In the present case, the presumption is not the "sole and sufficient basis" for the finding of contempt. A judgment of contempt using the § 1209.5 presumption is rendered only after proof beyond a reasonable doubt that a lawful order based on ability was made, that the contemnor had knowledge of the order, and that the order was not obeyed.

In addition to these considerations, it is helpful to observe how the statutory rebuttable presumption here involved actually operates:

> "If a party, relying upon a presumption that affects the burden of producing evidence, introduces evidence that tends to prove the existence of the basic facts giving rise to such presumption, and the party against whom the presumption operates either does, or does not, introduce evidence that tends to prove the nonexistence of such basic facts, but does introduce evidence that tends to prove the nonexistence of the presumed fact that is sufficient to support a finding of the nonexistence of the presumed fact, *the presumption disappears,* and the trier of fact must determine the existence or nonexistence of the presumed fact:
>
> (a) By weighing the evidence as to the existence of such basic facts and any appropriate inferences arising from those facts, if they are found to exist, against the evidence, if any, as to the nonexistence of such basic facts, and against the evidence as to the nonexistence of the presumed fact, and resolving the conflict; and doing so
>
> (b) Without regard to the presumption; and

> (c) Without making any change in the allocation of the burden of proof with respect to the presumed fact." (Emphasis added.)
>
> 2 Jefferson, *California Evidence Benchbook* 2d, Presumptions § 46.2 [Rule 4], p. 1687 (1982), explaining EC § 604

As the above authority shows, under CCP § 1209.5, once the prosecution has made out its prima facie case, if the citee raises *any* reasonable doubt about the existence of the presumed fact, the presumption disappears. Then, without regard to the presumption, the trial court is obliged to weigh *all* the evidence offered by both parties to determine whether the citee is in contempt of court, all the while holding the prosecution to its burden of proof beyond a reasonable doubt.

This procedure was recently validated by a majority of this Court in the context of a statute requiring a criminal defendant to prove self-defense in a trial for aggravated murder. In *Martin v. Ohio, supra,* the statute involved placed a burden of going forward with the evidence of an affirmative defense upon the accused, an "affirmative defense" being defined as "an excuse or justification peculiarly within the knowledge of the accused on which he can fairly be required to adduce supporting evidence." Ohio Rev. Code Ann. § 2901.05(C)(2) (1982).

Though the dissent in *Martin* objected on the ground that the affirmative defense served to negate an element of the crime, the majority explained:

> "When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises *any reasonable doubt* about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall short of proving self-defense by a preponderance of the evidence."
>
> *Martin v. Ohio, supra,* 480 U.S. at — (1987)

The dissent was unswayed, mainly, it appears, because of the potential for jury confusion with regard to the allocation of burdens and the standard of proof. Such concern, however, should not arise in a contempt proceeding based on a valid court order such as the one existing in this case.

A sentence for contempt under CCP § 1209.5 cannot exceed five days per count. CCP § 1218. Typically, support payments are due, as here, monthly, and thus, the *maximum* sentence per year is 60 days in the county jail. (Attempts at charging weekly or daily counts have been disapproved. *Warner v. Superior Court, supra,* 126 Cal. App.2d at 825-826). Therefore, a contempt charged under § 1209.5 of the CCP is a petty offense (*Pacific Tel. and Tel. Co. v. Superior Court,* 265 Cal.App.2d 370, 375 (1968)), and the citee has *no right to a jury. International Molders Etc. Union v. Superior Court,* 70 Cal.App.3d 395, 409 (1977); *People ex rel. Field v. Turner,* 1 Cal. 152 (1850).[22]

Since there is no right to a jury in a § 1209.5 contempt proceeding, the concerns articulated by the dissenters in

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[22] Neither is there a right to plead once in jeopardy, as *Derner* and *Batey, supra,* show. Thus, although a contempt may be denominated as "quasi-criminal," *all* the procedural protections applicable to a criminal case are *not* extended to the citee in a § 1209.5 contempt action. This is so because, as a different panel of the California Court of Appeal, Fourth District, has said, *"Section 1209.5 of the Code of Civil Procedure . . . defines no crime at all.* The section merely specifies the facts that, if proven, shall constitute prima facie evidence of contempt of a child support order, thus, shifting the burden of producing evidence upon the contemnor." (Emphasis added.)
Lyons v. Municipal Court, supra, 75 Cal.App.3d at 838.

Martin should be assuaged. A trial judge must be presumed capable of applying the statutory procedure properly. *Ross v. Superior Court,* 19 Cal.3d 899, 913-915 (1977); EC § 664. Even assuming the defense of inability overlaps with an essential "element" of the prosecution's case, the procedure set out in § 1209.5 causes no confusion or unfairness. Consequently, there is no constitutional infirmity in § 1209.5 under the Fourteenth Amendment, *even if* this be viewed as a criminal case, and the statute should therefore be upheld.

E. IN A CIVIL CONTEMPT PROCEEDING TO ENFORCE AN OBLIGATION TO PAY COURT-ORDERED CHILD SUPPORT, REQUIRING THE CITEE TO CARRY A BURDEN OF PRODUCTION AS TO HIS AFFIRMATIVE DEFENSES SERVES TO ADVANCE A COMPELLING STATE INTEREST—ASSURING THAT CHILDREN RECEIVE THE SUPPORT THEY REQUIRE FROM THEIR PARENTS.

"Certainly there are few interests of greater importance to the state than the proper discharge by parents of their duties to their children." *Pencovic v. Pencovic,* 45 Cal.2d 97, 103 (1955). California CC §§ 196 and 206 declare that parents have a legal (not to mention moral) duty to support and educate their children. And CC § 4700(a) indicates how important the California legislature deems that duty to be in cases where a court order for support has been made. It provides, "[a]ll payments of support shall be made by the person owing the support payment *prior to the payment of any debts* owing to creditors." (Emphasis added.)[23] Furthermore, federal regu-

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[23] The 1984 Child Support Enforcement Amendments, *supra,* expressly recognize that child support is not a "debt," within

(Continued on following page)

lations *require* that the "IV-D agency [which, in this case, is the Office of the District Attorney For the County of Orange, Family Support Division] *must* maintain an *effective* system . . . to enforce [support] obligation[s] . . . Such attempts to collect support *must include . . . contempt proceedings to enforce* an extant court order." (Emphasis added.) 45 CFR § 303.6.

If the Court of Appeal's holding in this case survives it will be impossible for the IV-D agency, with its limited human resources, to carry out the requirements of 45 CFR §§ 303.6 and 303.7 where the obligor is self-employed. There are not enough investigators available to have one sitting in each debtor's driveway. And, of even greater consequence, an order permitting the Court of Appeal's opinion to stand will reduce CC §§ 196, 206, and 4700(a) to "sounding brass and tinkling cymbal" and turn the child's support order into a worthless piece of scrap.

In *Rylander,* the majority opinion concludes by commenting on what would have resulted were the Court of Appeal's view to have prevailed there:

> "The Court of Appeals' view of the matter would require still additional hearings on the issue of pos-

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(Continued from previous page)

the constitutional prohibition of imprisonment for debt, but a unique familial obligation (42 U.S.C. § 666(b)(7) (Supp.III. 1986)); California law is to the same effect. *In re Hendricks,* 5 Cal.App. 3d 793, 796 (1970); *Bailey v. Superior Court,* 215 Cal. 548, 553 (1932). In connection with the 1984 Amendments, the Report of the House Ways and Means Committee, states: "The Committee believes that the payment of child support is such a fundamental obligation that it takes precedence over other economic burdens or liabilities that parents may incur." H.Rep.No. 527, 98th Cong. 1st Sess. 34 (1983). CC § 4700(a) mirrors that sentiment.

session or control of the corporate books or records, with the Government having the burden of production at the reopened contempt hearing. Given the oft-stated reliance of the federal income tax system on self-assessment, *a plainer guide to the successful frustration of this system could hardly be imagined.*" (Emphasis added.)

United States v. Rylander, supra, 460 U.S. 752, 762 (1983)

Here, if the Court of Appeal's view is to prevail, the plainest guide to the successful frustration of the statutory duties concerning the support owed by parents to their children will have been provided. That the Court of Appeal in *Feiock* "recognize[s] the impact [its] decision will have" [180 Cal.App.3d at 652] is of exceedingly little consolation to Petitioner or to three heretofore forgotten children in Ohio. It is commendable that the court below is willing to "face the music," but this tune—respectfully—should never have been played.[24] It will, in the cases where the civil contempt remedy is most productive and necessary, create an impossible burden of proof for the party prosecuting the contempt. Such a result is unnecessary, unfair and not constitutionally compelled. It is also frightening.

[24] It is an extremely hollow hope held out by the lower court when, as it effectively eviscerates the civil contempt remedy, it writes, "Of course the contempt action has no effect on [Respondent's] continuing obligation to comply with the court order until it is modified." *Feiock,* 180 Cal.App.3d at 654, fn.1. The three Feiock children have found no solace or relief in the lower court's magnanimous concession. How unfair it is, on the one hand, to tell Mrs. Feiock that she has *a vested right* in the child support arrearage that cannot be retrospectively modified, (*Sanford v. Sanford,* 273 Cal.App.2d 535 (1969); *In re Marriage of Acosta,* 67 Cal.App.3d 899 (1977)), and yet, here, for all practical purposes, divest her of that right by emasculating the only possible method of its enforcement. Cf. *In re Marriage of Fabian,* 41 Cal.3d 440 (1986), where an analogous divestment (although in the context of a community property division) was held to violate the *wife's* due process rights.

CONCLUSION

The reasoning, analysis and holding of the opinion below represent a novel and empirically ill-advised departure from the law as previously settled not only in California but generally throughout the United States. (See Petition for Certiorari, footnote 5). The primary effect of the opinion is to eliminate civil contempt as an enforcement tool in the large volume of cases where parents are self-employed. It effectively exempts a class of individuals—those who are self-employed—from application of the law. This denies the *custodial parent* due process of law. Contrary to its construction by the court below, *Ulster County Court v. Allen* does not compel or countenance such an unjust result.

This Court alone remains able to assure that *all* children have equal and enforceable rights to support from their parents in the courts of California. By correctly applying the applicable case law, *United States v. Rylander, supra,* and *Martin v. Ohio, supra,* to the issue of the constitutionality of CCP § 1209.5, this Court can restore vitality to the rights of those children whose non-custodial parents are self-employed and, as a result, facilitate equal application of the law.

Mandatory presumptions are constitutional in cases such as the one at bar where a defendant's burden of production is extremely low. The policy considerations out-

lined above argue strongly in favor of fitting the subject statute into the *Ulster* and *Roder* mandatory presumption exception. After all, it should be more important for courts to encourage able-bodied parents to put their hands in their back pockets where they can do some good than to invite those parents to "sit on" them. To hold otherwise will leave thousands of children with nothing to sit on *but* their hands.

Accordingly, and for all the above reasons, Petitioner prays this Honorable Court to find CCP § 1209.5 constitutional, to uphold the Judgment of the trial court and reverse the Court of Appeal.

DATED this 14th day of May, 1987.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

2. The Fifth Amendment to the United States Constitution provides in part:

> "No person . . . shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

3. California *Code of Civil Procedure,* § 1209.5, provides:

> "When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his child, proof that such order was made, filed, and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

4. California *Code of Civil Procedure,* § 1672 (Revised Uniform Reciprocal Enforcement of Support Act of 1968) states:

> "All duties of support, including the duty to pay arrearages, are enforceable by an action under this title, including a proceeding for civil contempt. The defense that the parties are immune to suit because of their relationship as husband and wife or parent and child is not available to the obligor."

5. California *Civil Code,* § 196, states in relevant part:

"The father and mother of a child have an equal responsibility to support and educate their child."

6. California *Civil Code,* § 206, provides:

"It is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability . . . "

7. California *Civil Code,* § 4700(a) provides in pertinent part:

"All payments of support shall be made by the person owing the support payment prior to the payment of any debts owing to creditors."

8. 45 C.F.R. § 303.6 provides in pertinent part:

"For all cases under the State plan in which the obligation to support and the amount of the obligation have been established, the IV-D agency must maintain an effective system for identifying, within 30 days, those cases in which there is a failure to comply with the support obligation and to contact such delinquent individuals as soon as possible in order to enforce the obligation and obtain the current support obligation and any arrearages. Such attempts to collect support must include the institution of the following procedures as applicable and necessary:

(a) Contempt proceedings to enforce an extant court order . . . "

9. 45 C.F.R. § 303.7(a)(3) provides:

" . . . [T]he IV-D agency must (3) process and enforce all court orders referred by another state . . . The IV-D agency shall utilize the same remedies normally applied to its own cases."

10. 45 C.F.R. § 305.100 provides:

(a) If the Secretary finds, on the basis of the results of the audit described in this part, that a State's program does not substantially meet the requirements in title IV-D of the Act, as implemented by Chapter III of this title, and the State does not achieve substantial compliance with those requirements identified in the notice within the corrective action period approved by the Secretary under § 305.99(c) of this part and maintain compliance in areas cited in the notice as marginally acceptable under § 305.99(b)(2) of this part, total payments to the State under title IV-A of the Act will be reduced for the period prescribed in paragraph (c) or (d) of this section by:

(1) Not less than one nor more than two percent of such payments for a period beginning in accordance with paragraph (c) or (d) of this section not to exceed the one-year period following the end of the suspension period;

(2) Not less than two nor more than three percent of such payments if the finding is the second consecutive finding made as a result of an audit for a period beginning as of the second one-year period following the suspension period not to exceed one year; or

(3) Not less than three nor more than five percent of such payments if the finding is the third or subsequent consecutive finding as a result of an audit for a period beginning as of the third one-year period following the suspension period.

(b) In the case of a State that has achieved substantial compliance with the unmet criteria identified in the notice and maintained substantial compliance with any marginally-met criteria identified in the notice within the corrective action period approved by the Secretary under § 305.99 of this part, the penalty will not be applied.

(c) In the case of a State whose penalty suspension ends because the State is not implementing its corrective action plan, the penalty will be applied as if the suspension had not occurred.

(d) In the case of a State whose penalty suspension ends because the State is implementing its corrective action plan but has failed to achieve substantial compliance with the unmet criteria identified in the notice and maintain substantial compliance with any marginally-met criteria identified in the notice within the corrective action period approved by the Secretary under § 305.99 of this part, the penalty will be effective for any quarter that ends after the expiration of the suspension period until the first quarter throughout which the State IV-D program is in substantial compliance with the requirements of title IV-D of the Act.

(e) A consecutive finding under paragraph (a)(2) or (3) of this section occurs only when the State does not achieve substantial compliance with the same criterion or criteria.

(f) Any reduction required to be made under this section shall be made pursuant to § 205.146(d) of this title.

(g) The reconsideration of penalty imposition provided for by § 205.146(e) of this title shall be applicable to any reduction made pursuant to this section.

11. California Evidence Code, § 604 states:

"The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

AMICUS CURIAE

BRIEF

No. 86-787

In the Supreme Court of the United States

OCTOBER TERM, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF ALTA SUE FEIOCK, PETITIONER

v.

PHILLIP WILLIAM FEIOCK

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

In civil contempt proceedings for nonpayment of court-ordered child support, California law provides that prima facie evidence of contempt is established by proof that the delinquent parent had notice of the child-support order and failed to comply with it. The question presented is whether this California statute violates the Due Process Clause of the Fourteenth Amendment by shifting to the delinquent parent the burden to show a current inability to pay.

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*ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF CALIFORNIA, FOURTH
APPELLATE DISTRICT, DIVISION THREE*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

The issue in this case is whether, in a civil contempt proceeding to compel payment of court-ordered child support, states may provide that formal notice of the support order and proof of noncompliance therewith constitute prima facie evidence of contempt, thereby placing the burden on the delinquent parent to show a current inability to comply with the support order. The California Court of Appeal has held that such a burden-shifting provision violates the Due Process Clause of the Fourteenth Amendment.

The United States has a strong interest in the states' being allowed to employ such burden-shifting provisions to facilitate the collection of child-support payments from recalcitrant parents who defy valid court orders. Nonpayment of child support is a problem of national dimensions,

causing a steady drain on federal resources devoted to social welfare programs. Over $3 billion in child support goes unpaid each year, and the Department of Health and Human Services (HHS) estimates that at least one-third of this sum, or more than $1 billion annually, ultimately comes out of the budget of the Aid to Families with Dependent Children (AFDC) program.

The AFDC program, which Congress established in 1935 (Social Security Act, Tit. IV, §§ 401-406, 42 U.S.C. (& Supp. III) 601-676), is designed to provide financial assistance to needy families with children who have been deprived of parental care or support by the death, incapacity or "continued absence from the home" of a parent (42 U.S.C. (& Supp. III) 606(a)). About half of each AFDC payment is paid by the recipient's state; the other half is borne by the United States through a matching contribution (42 U.S.C. 603). By 1974, the problem of support-payment delinquency had reached the point where almost 25% of AFDC children were covered by support orders, but few of these orders were obeyed even though many absent parents had the ability to pay. See S. Rep. 93-1356, 93d Cong., 2d Sess. 42-44 (1974); 120 Cong. Rec. 38196-38198 (1974) (remarks of Rep. Griffiths). Congress concluded in 1974 that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of the non-support of children by their absent parents" (S. Rep. 93-1356, *supra*, at 42). Congress believed that the AFDC program in particular had evolved into a publicly-funded substitute for unenforced parental support obligations.

Among the remedies that Congress implemented to address this problem was a provision that requires an AFDC applicant (generally, the mother), as a condition of eligibility, to assign to the state any right to support that she or her children may possess (Social Services Amendments of 1974, § 101(c)(5)(C), 42 U.S.C. 602(a)(26)(A)).[1] The purpose of this provision was to relieve the mother of the burden of enforcing the abandoning father's child-support obligations, and to transfer that burden to the states with their greater resources and better collection techniques. See *Sorenson* v. *Secretary of the Treasury*, No. 84-1686 (Apr. 22, 1986), slip op. 1-2. From any amounts collected pursuant to such agreement, the state in turn reimburses the federal government "to the extent of its participation in the financing of the AFDC payment" (45 C.F.R. 304.26(a)).

Congress has also taken steps to aid and encourage states in the enforcement of support orders. Child-support enforcement services are required in every state as a condition of federal matching funds for the state's AFDC program. 42 U.S.C. (Supp. III) 602(a)(27). Participating states are encouraged to enforce their existing laws and to adopt proven effective procedures to improve their support-recovery operations. These techniques include expedited procedures for establishing paternity and enforcing child-support obligations; wage withholding, liens and bonds to ensure future payments; and provision for withholding state income tax refunds to satisfy support arrearages. 42 U.S.C. (Supp. III) 666. Furthermore, HHS regulations require states to "maintain an effective system" to enforce child-support obligations, including the use of "[c]ontempt proceedings to enforce an extant court order" (45 C.F.R. 303.6). Pursuant to Title IV-D of the Social Security Act (42 U.S.C. (& Supp. III) 651 *et seq.*), the federal government underwrites 70% of the states' administrative costs for the establishment and enforcement of child-support orders, both for AFDC parents and for parents not receiving public assistance.

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[1] Certain aspects of the AFDC assignment provision are before this Court in *Bowen* v. *Gilliard*, No. 86-509 (argued Apr. 22, 1987).

Despite federal efforts to encourage the states to expand their child-support programs and to develop and use more efficient procedures to establish and enforce support orders, the percentage of paying cases remains low. In 1983, for example, of the four million women entitled to receive child support, only half received the full amount they were due. Bureau of the Census, U.S. Dep't of Commerce, *Series P-23, No. 148, Child Support and Alimony: 1983*, at 1. And in 1985, only 11% of AFDC cases handled by the states and 30.3% of non-AFDC cases produced a single payment of child support. 2 Office of Child Support Enforcement, HHS, *Tenth Annual Report to Congress for the Period Ending September 30, 1985: Child Support Enforcement Statistics Fiscal Year 1985*, at 11.

Particularly problematic are cases such as the present one in which the delinquent parent is self-employed and has no wages or other obvious assets to attach. In those circumstances, the only practical procedure by which to enforce regular support payments is citation for contempt of court. As a result, almost every state has streamlined contempt procedures in child-support cases, permitting a finding of contempt based solely on proof that the delinquent parent had knowledge of a valid support order and failed to abide by it. The burden then shifts to the delinquent parent in these states to show a current inability to make the payments. The validity of all such state rules—and hence the ability of the states to counter the still-widespread problem of nonpayment of support—is accordingly at stake in this case.

Effective enforcement of child-support orders could save the AFDC program over $1 billion each year. This savings would be accomplished by eliminating the need of many families for AFDC assistance altogether and by permitting reimbursement of the state and federal governments for funds expended on those families who must nevertheless resort to AFDC and who have assigned their

support payments to the state. This money could then be recycled in the AFDC program and devoted to those most in need.

STATEMENT

1. Respondent Phillip William Feiock and Alta Sue Feiock were divorced in California on January 19, 1976 (J.A. 7-8). Mrs. Feiock obtained custody of their three children, and respondent was ordered to make regular child-support payments (*id.* at 8). Mrs. Feiock and her three children subsequently moved to Ohio. When respondent failed to make any of the court-ordered support payments, Mrs. Feiock sought the assistance of her local child-support enforcement agency. Ohio thereupon initiated a petition under the Uniform Reciprocal Enforcement of Support Act (see J.A. 6). That petition was received in California by the Orange County District Attorney, petitioner here, who took charge of the case on behalf of Mrs. Feiock (*id.* at 3-6). Mrs. Feiock was listed as the "plaintiff" in the case (*id.* at 3).

Respondent was summoned before the Orange County Superior Court on June 22, 1984. Following a hearing (see J.A. 9-14), the court ordered respondent to start making his child-suppport payments, but granted a temporary reduction to $150 per month in the amount due (*id.* at 15-17). During the eight-month period between June 22, 1984, and February 22, 1985, respondent made only two monthly payments. Because respondent was self-employed and maintained no bank accounts or other assets in his own name upon which an execution could be levied (*id.* at 4-11), the only practical enforcement mechanism for the support order was a civil contempt proceeding pursuant to Sections 1672 and 1209.5 of the California Code of Civil Procedure. Accordingly, the District Attorney, acting on behalf of Mrs. Feiock, filed an Order to Show Cause and Declaration for Civil Contempt (J.A. 18-20).

On August 9, 1985, a civil contempt hearing was conducted in superior court. The District Attorney, acting on behalf of Mrs. Feiock, established a prima facie case of contempt under Section 1209.5 by demonstrating that respondent had been formally advised of his obligation to pay support as ordered by the court and that he had failed to make the support payments (J.A. 24-26). At that point, the District Attorney rested. Respondent then made a motion for nonsuit, arguing that Section 1209.5 was unconstitutional in that it presumed, rather than requiring Mrs. Feiock to prove, that respondent was currently able to pay child support. Respondent asserted that the statute had the effect of shifting to him the burden of proving his current inability to comply with the support order, in supposed violation of his due process rights. *Id.* at 26. The court rejected this argument (*id.* at 27).

Following the denial of his motion for nonsuit, respondent took the stand and testified that he was financially unable to pay any child support (J.A. 27-34). Based on respondent's own testimony, the court found that respondent did have the financial ability to pay support for five of the months in which he had failed to do so (*id.* at 35). The court therefore found respondent in contempt for disobeying the court's order for those five periods (*id.* at 35-36, 40). The court sentenced respondent to five days on each count, to be served consecutively, for a total of 25 days. The court then suspended that sentence and placed respondent on three years' informal probation. The conditions of probation were that respondent discharge the arrearages in his child support at a specified rate and that he pay his future installments of child support on time. *Id.* at 36, 40.

2. Respondent filed a petition for writ of habeas corpus with the California Court of Appeal requesting that the superior court's judgment be set aside on the ground that his motion for nonsuit had been improperly denied.

The court of appeal granted the writ. It held that Section 1209.5 created a "mandatory presumption" that respondent was able to pay the court-ordered support and thereby violated his due process rights by "reliev[ing] the prosecution from proving every element of the offense beyond a reasonable doubt." Pet. App. A6.

The court noted that ability to pay is an essential element of the offense of contempt. "Ability to pay makes noncompliance wilful; it is not contempt if not wilful because of inability to pay" (Pet. App. A9). The court further stated that a contempt proceeding is a "quasi-criminal" proceeding in which every element of the offense must be proved beyond a reasonable doubt (*ibid.*). On the court's view, Section 1209.5 violated this stricture by creating a presumption that the defendant is able to make the payments. "Although rebuttable," the court stated, "the presumption actually shifts the burden of proof to the accused" on the element of ability to pay (*id.* at A8). Relying on this Court's decisions involving the use of mandatory presumptions in criminal prosecutions (*Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979)), and on a California Supreme Court case applying those decisions (*People* v. *Roder*, 33 Cal.3d 491, 658 P.2d 1302, 189 Cal.Rptr. 501 (1983)), the court of appeal concluded that a presumption shifting the burden of proof to a criminal defendant is unconstitutional "unless the basic fact proved * * * '*compels* the inference of guilt beyond a reasonable doubt.' " Pet. App. A8 (quoting *People* v. *Roder*, 33 Cal.3d at 498 n.7, 658 P.2d at 1306 n.7, 189 Cal. Rptr. at 505 n.7 (emphasis in original)).

The court acknowledged that "the basic fact proved" by the District Attorney here—respondent's noncompliance with a valid court order of which he was aware—suggested an inference that respondent was acting willfully, since the order to pay child support entailed a finding that he was able to pay that amount at the time the order was made.

The court stated, however, that this inference was not inevitable because "financial circumstances change" and "[t]he inference of continuing ability to pay weakens with the passage of time" (Pet. App. A9). Under the Due Process Clause, the court concluded, "the Legislature may not take away this defense by imposing a mandatory presumption compelling a conclusion of guilt without independent proof of an ability to pay" (*ibid.*). Without adverting to the fact that respondent had taken the stand, and that his testimony as to his asserted inability to pay had been found incredible, the court of appeal held that "section 1209.5 establishes a mandatory presumption within the meaning of *Ulster* [*County Court* v. *Allen, supra*]," and that "section 1209.5 * * * is unconstitutional because the mandatory nature of the presumption lessens the prosecution's burden of proof." Pet. App. A8, A9-A10.[2]

The court of appeal therefore granted the writ of habeas corpus, holding that because of the unconstitutionality of Section 1209.5, the trial court should have granted respondent's "motion for judgment of acquittal" (Pet. App. A10).[3] The court, however, did not strike down the

[2] Although the court of appeal did not explicitly indicate whether it was basing its holding on the federal or the state Constitution, the court's reasoning makes it clear that it was referring to the former. As Justice O'Connor noted in granting a stay (No. A-288 (Oct. 23, 1986)), the key elements of the court's reasoning (Pet. App. A7, A8, A10) were derived from an interpretation of this Court's decisions in *Ulster County Court* v. *Allen, supra* and *Sandstrom* v. *Montana, supra*; both of those decisions, of course, involved the Due Process Clause of the Fourteenth Amendment. See 442 U.S. at 147-148 & n.5; *id.* at 513, 524. The principal California decision upon which the court of appeal relied – *People* v. *Roder, supra* – was likewise based explicitly on this Court's decisions construing the Due Process Clause of the Fourteenth Amendment. See 658 P.2d at 1305-1307, 1309-1311 (cited in Pet. App. A6, A7, A8, A9).

[3] The court of appeal incorrectly characterized this motion. A motion for judgment of acquittal is made in the context of a criminal case. The contempt proceeding in this case was brought under the California Code of Civil Procedure and respondent accordingly made a "motion for nonsuit" (J.A. 26).

statute. Rather, it held that, for future purposes, "section 1209.5 should be construed as allowing [only a] permissive inference" of ability to pay (*id.* at A10-A11).

The California Supreme Court denied the state's petition for review, Justice Lucas dissenting (Pet. App. B1). On October 23, 1986, Justice O'Connor granted the State's application for a stay pending disposition of a petition for a writ of certiorari. Certiorari was granted on March 9, 1987.

SUMMARY OF ARGUMENT

The court of appeal erred in treating the instant civil contempt proceeding as if, for purposes of the Due Process Clause, it were a criminal prosecution. The character of the proceeding was remedial, and its purpose was to compel compliance with a valid court order. The conditional nature of the sentence respondent received was clearly designed to induce him to make future support payments, not to punish past nonpayment.

It does not offend the Due Process Clause of the Fourteenth Amendment to place the burden on a civil contemnor to show a current inability to comply with a court order directing payment of child support. This Court's cases clearly establish the propriety of shifting the burden to the defendant once a prima facie case of contempt has been established. Such a burden-shifting device is essential to secure compliance with court orders, and almost every state in the country shifts the burden to the defendant to prove inability to comply with a child-support order in an effort to counter the widespread problem of noncompliance.

ARGUMENT

IN A CIVIL CONTEMPT PROCEEDING, THE DUE PROCESS CLAUSE PERMITS A STATE TO REQUIRE THAT THE DEFENDANT DEMONSTRATE HIS INABILITY TO COMPLY WITH A PREVIOUS COURT ORDER

A. The Court Of Appeal Erred In Treating The Instant Civil Contempt Proceeding As If, For Purposes Of The Due Process Clause, It Were A Criminal Prosecution

1. In *Shillitani* v. *United States*, 384 U.S. 364, 368 (1966), this Court noted that the distinction between civil and criminal contempt turns on "the character and purpose of these actions." The character of a civil proceeding is remedial, and its purpose is to compel compliance with a valid court order. Civil contempt is "intended to operate in a prospective manner—to coerce, rather than punish" (*id.* at 370).

Criminal contempt, by contrast, is "a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968). In other words, criminal contempt constitutes punishment for " 'doing what ha[s] been prohibited' " (*Shillitani*, 384 U.S. at 368, quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 449 (1911)), whereas civil contempt is "a sanction to enforce compliance with an order of the court." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). The purpose of civil contempt is "remedial," and "it matters not with what intent the defendant did the prohibited act." *Ibid.* (footnote omitted).

The difference between civil and criminal contempt is shown most clearly in the purpose behind the sentence imposed. In *Shillitani*, the defendants were each sentenced to two years' imprisonment. The sentences, however, were expressly conditioned to last only so long as the defendants continued to defy a court order that they testify before a grand jury (384 U.S. at 365). This Court

acknowledged that "any imprisonment, of course, has punitive and deterrent effects," but held that imprisonment "must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify." 384 U.S. at 370. Since the purpose of the sentence in *Shillitani* was "to obtain answers to questions for the grand jury" (*ibid.*) and not to punish or deter misconduct though imposition of an unconditional jail term, the Court concluded that the proceedings were civil and, hence, that the usual constitutional safeguards attendant upon a criminal prosecution were not required.

The contempt proceedings in this case were clearly civil in character and purpose. The District Attorney brought this action on behalf of Mrs. Feiock under Sections 1672 and 1209.5 of the California Code of Civil Procedure. The former Section is the general civil contempt provision, and the latter defines the elements of civil contempt in the context of nonpayment of child support. The two Sections together form a coercive device to compel payment of child support, not to punish nonpayment.[4] They create a perpetually available stick to coax reluctant former spouses into payment, and that is precisely how the trial court used the provisions in this case.

By suspending respondent's sentence and placing him on probation, expressly conditioned upon his meeting his support obligation, the court gave respondent a continuing incentive to pay child support. The court used the civil contempt proceeding to induce respondent to conform his future behavior to the court's order. It did not punish him

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[4] Section 270 of the California Criminal Code contains a separate provision defining the crime of nonpayment of support. The crime of nonpayment must be prosecuted by the state. By contrast, a civil contempt proceeding may be initiated by the aggrieved spouse and need not involve the state at all. In the instant case, the District Attorney was merely acting, as he was authorized to do by the Uniform Reciprocal Enforcement of Support Act, on behalf of Mrs. Feiock, the named plaintiff, who lived in Ohio at the time.

for past nonpayment. The conditional nature of this sentence clearly demonstrates the civil nature of the contempt proceeding.[5]

2. The fact that the court of appeal characterized the proceeding as "quasi-criminal" does not change this analysis. The same terminology was applied by the lower courts in *Shillitani*, but this Court looked beyond the label to the "character and purpose" of the proceeding (384 U.S. at 368, 369). "The fact that both the District Court and the Court of Appeals called [the defendants'] conduct 'criminal contempt' does not disturb our conclusion. Courts often speak in terms of criminal contempt and punishment for remedial purposes." *Ibid.*

Nor, as respondent apparently suggests (Br. in Opp. 3-8), does the label affixed by the court of appeal somehow provide an adequate and independent state ground for the decision below, thereby insulating it from this Court's review. The court of appeal plainly decided a *federal* constitutional question, purporting to apply this Court's precedents construing the Fourteenth Amendment's Due Process Clause to hold a state statute unconstitutional. The demands that the Due Process Clause places upon a contempt proceeding, however, depend upon the nature and purpose of that proceeding, not upon the label affixed to it by the state court.[6] Quite obviously, a state court could not insulate what was at bottom a criminal proceeding from the demands of the Federal

[5] The nonpunitive, coercive nature of respondent's sentence is further illustrated by statements the court made to him at the time of sentencing. The court indicated that it was still willing to listen if respondent encountered future financial difficulties and would not necessarily respond by immediately sending him to jail for nonpayment. "If you get into difficulty, don't sit. Come to court * * *. If you are in trouble, get in here, let the court know about it." J.A. 36.

[6] In any event, the California Supreme Court purports to follow this Court's precedent in distinguishing between civil and criminal contempt, focusing on the character and purpose of the proceeding. See *Mitchell* v. *Superior Court*, 729 P.2d 212, 221-222, 232 Cal. Rptr. 900, 909-910 (1987); *People* v. *Derner*, 227 Cal. Rptr. 344, 346 (Ct. App. 1986).

Constitution by labelling the proceeding "civil." Similarly here, the court of appeal erred—and erred as a matter of federal constitutional law—in subjecting this civil contempt proceeding to exaggerated due process scrutiny by the contrivance of labelling it "quasi-criminal."

Even if respondent is correct that California law affords "far greater protections than th[ose] afforded by the Federal government or other states with respect to civil contempt" (Br. in Opp. 3), that fact does not alter the federal constitutional requirements applicable to such proceedings. The states are free, by state statute or constitution, to go beyond the requirements of the Federal Constitution in providing protections to civil contemnors. But the addition of ancillary procedural protections to a civil contempt proceeding does not transform that proceeding into a criminal prosecution for purposes of the Fourteenth Amendment's Due Process Clause.

B. It Does Not Offend Due Process To Place The Burden On A Civil Contemnor To Show A Current Inability To Comply With A Court Order Directing Payment of Child Support

In *United States* v. *Rylander*, 460 U.S. 752 (1983), this Court held that an alleged civil contemnor bears the burden of showing a current inability to comply with a court order. " '[A] contempt proceeding,' " the Court explained, " 'does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.' " *Id.* at 756 (quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948)). In *Rylander*, the order alleged to have been disobeyed required the defendant to produce records in his possession, and the Court stated that there was a "presumption of continuing possession arising from the en-

forcement order" (460 U.S. at 760). The Court noted that a contemnor "[i]n a civil contempt proceeding * * * may assert a *present* inability to comply with the order in question" (*id.* at 757 (emphasis in original)). "It is settled, however, that in raising this defense the defendant has the burden of production." *Id.* at 757, 760-761.

With one caveat, the constitutionality of Section 1209.5 follows *a fortiori* from *Rylander*. That caveat concerns the distinction between a "burden of production" and a "burden of persuasion." In *Ulster County Court* v. *Allen*, 442 U.S. at 157-158 n.16, this Court distinguished between two sorts of mandatory presumptions—"presumptions that merely shift the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution," and "presumptions that entirely shift the burden of proof to the defendant." *Rylander* placed upon the civil contemnor only a "burden of production," a burden of "adduc[ing] evidence as to his present inability to comply with [the court] order" (460 U.S. at 757, 761). The court of appeal in the instant case, by contrast, characterized Section 1209.5 as "shifting the burden of proof to the accused" (Pet. App. A8).[7]

The California court of appeal was likely wrong, as a matter of California law, in its construction of Section 1209.5.[8] Be that as it may, however, as a matter of federal

[7] Although the phrase "burden of proof" is ambiguous—"burden of proof" may mean either "burden of production" or "burden of persuasion" (see *McCormick on Evidence* § 336 (2d ed. 1972))—the court of appeal seems to have intended the latter meaning. Indeed, most state courts appear to use the expression "burden of proof" in the latter sense (see cases cited in note 11, *infra*).

[8] By its terms, Section 1209.5 purports only to set out the elements that constitute "prima facie evidence of a contempt of court" in the context of failure to obey a valid child-support order. The statute makes no mention of where the ultimate burden of persuasion lies and

constitutional law neither a presumption that shifts the burden of production to the alleged contemnor nor one that shifts the burden of persuasion offends due process. A number of this Court's cases have held that the burden of persuasion may properly be placed on the alleged con-

other California courts have read Section 1209.5 as shifting only the burden of production to the defendant. See, *e.g.*, *Lyons* v. *Municipal Court*, 75 Cal.App.3d 829, 838, 142 Cal. Rptr. 449, 452 (Ct. App. 1977) (Section 1209.5 "merely specifies the facts that, if proven, shall constitute prima facie evidence of contempt of a child support order, thus shifting the burden of producing evidence upon the contemnor"); *Oliver* v. *Superior Court*, 197 Cal.App.2d 237, 242, 17 Cal. Rptr. 474, 476-477 (Ct. App. 1961) ("The effect of [Section 1209.5] is to place the burden of going forward upon the contemn[o]r. It does not shift the burden of proof to him.").

The court of appeal below did not acknowledge this contrary precedent, and apparently failed to recognize that there is a question as to the proper reading of the statute. Indeed, the court failed even to notice that the trial court read the statute as shifting only the burden of production and so applied it in this case. In denying respondent's motion for a nonsuit, the superior court stressed that Section 1209.5 only "shift[s] the burden over to the defendant *to go forward*." J.A. 27 (emphasis added). Once respondent did go forward by testifying in his own behalf, the court then relied on respondent's own testimony in finding that he did have an ability to make five of the monthly support payments. *Id.* at 34-38. The trial court did not rely for its ultimate finding of facts upon any presumption contained in Section 1209.5. Rather, the trial court found that "the evidence there is sufficient to show that [respondent] was in contempt for those five periods," whereas respondent "didn't have the ability" to pay during the other months at issue, with the result that the contempt charges for those other months "will be dismissed" (J.A. 35).

In light of the fact that the trial court interpreted and applied Section 1209.5 in much the same way that the court of appeal said that the statute must be read in future cases—viz., as creating a "permissive inference of wilful failure to comply in spite of an ability to pay" (Pet. App. A10-A11)—it is unclear why the court of appeal found it necessary to annul the judgment of contempt against respondent. Even under its erroneous application of misunderstood constitutional principles to a misconstrued statute, the judgment of contempt should have been upheld.

temnor to show a current inability to comply with the court's order. See, *e.g.*, *McPhaul* v. *United States*, 364 U.S. 372, 379 (1960); *Maggio* v. *Zeitz*, 333 U.S. at 75-76; *Oriel* v. *Russell*, 278 U.S. 358, 366 (1929). Indeed, the Court has so held even in the context of a criminal contempt proceeding for failure to produce records in response to a subpoena. *United States* v. *Fleischman*, 339 U.S. 349, 362-363 (1950).[9]

Some such burden-shifting device is clearly necessary to secure compliance with judicial support decrees. The alternative, as the court of appeal frankly acknowledged, is to hold that "despite the continuing obligation to comply, [the defendant] may literally sit on his hands, and defend any contempt allegation by relying on the prosecution's burden of proof: its burden to affirmatively show, beyond a reasonable doubt, his ability to comply with the order, to wit, his ability to pay." Pet. App. A9 (original quotation marks omitted). Allowing a delinquent father to "sit on his

[9] The Court's decision in *Fleischman* indicates that even if the court of appeal were correct, for purposes of the Due Process Clause, in characterizing the instant action as a criminal prosecution, the burden-shifting presumption in Section 1209.5 would still be constitutional. There is no reason to believe that the viability of *Fleischman* has been undermined by the Court's subsequent cases. Indeed, in *Martin* v. *Ohio*, No. 85-6461 (Feb. 25, 1987), this Court recently upheld a conviction for aggravated murder in which the burden was placed on the defendant, who claimed self-defense, to prove her affirmative defense by a preponderance of the evidence. Under Ohio criminal law, an affirmative defense for which the defendant bears the burden of proof is one involving "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Ohio Rev. Code Ann. § 2901.05(C)(2) (Page 1982) (quoted in *Martin* v. *Ohio*, slip op. 1). Similarly here, under California child-support law, the alleged inability of a recalcitrant husband to make support payments is "an excuse or justification peculiarly within [his] knowledge," and the legislature can properly place upon him a burden "to adduce supporting evidence" as to his affirmative defense.

hands" in this way would cripple efforts to enforce child-support orders, given the large volume of such cases and the inherent difficulty of proving that the defendant is able to pay. As the Supreme Court of Idaho has noted (*In re Martin*, 76 Idaho 179, 187, 279 P.2d 873, 878 (1955)):

> In such cases the burden must necessarily rest upon the defaulting father to show his inability to comply. The mother, acting for the children, would in most cases, be unable to make any satisfactory showing on that issue. Ordinarily the facts are not available to her. To require her to allege and prove the ability of the recalcitrant father to support his children would consequently result in injustice.

Almost every state has recognized that in contempt proceedings for failure to pay child support, it is necessary to shift the burden to the defendant to demonstrate a current inability to pay. In a few states, only the burden of production shifts.[10] In the vast majority of states, however, the burden of persuasion shifts to the defendant.[11] As we

[10] See, *e.g.*, *Bowen* v. *Bowen*, 471 So.2d 1274, 1278-1279 (Fla. 1985); *Skinner* v. *Ruigh*, 351 N.W. 2d 182, 185 (Iowa 1984); *Coleman* v. *Coleman*, 664 P.2d 1155, 1157 (Utah 1983) (alimony).

[11] See, *e.g.*, *Johansen* v. *State*, 491 P.2d 759, 766 (Alaska 1971); *Leslie* v. *Leslie*, 174 Conn. 399, 401-403, 389 A.2d 747, 749 (1978); *Smith* v. *Smith*, 427 A.2d 928, 932 (D.C. 1981); *In re Martin*, 76 Idaho at 187, 279 P.2d at 878; *In re Marriage of Logston*, 103 Ill. 2d 266, 284-286, 469 N.E.2d 167, 175 (1984) (alimony); *Linton* v *Linton*, 166 Ind. App. 409, 421-423, 336 N.E.2d 687, 695 (1975); *Brayfield* v. *Brayfield*, 175 Kan. 337, 341-342, 264 P.2d 1064, 1068 (1953) (alimony); *Dalton* v. *Dalton*, 367 S.W.2d 840, 842 (Ky. Ct. App. 1963); *Rutherford* v. *Rutherford*, 296 Md. 347, 355-357, 464 A.2d 228, 233 (1983); *Hopp* v. *Hopp*, 279 Minn., 170, 175-176, 156 N.W.2d 212, 217 (1968); *Clements* v. *Young*, 481 So.2d 263, 271 (Miss. 1985); *Blair* v. *Blair*, 600 S.W.2d 143, 145 (Mo. 1980) (alimony and visitation rights); *State* v. *District Court*, 122 Mont. 76, 80-81, 199 P.2d 272, 274 (1948) (alimony); *Bond* v. *Bond*, 16 N.J. Super. 83, 84-86, 83 A.2d 794, 795 (App. Div. 1951); *Hodous* v. *Hodous*, 76 N.D. 392, 401, 36

have noted, the California courts have not yet definitively resolved whether Section 1209.5 shifts the burden of persuasion or the burden of production. In practical effect, it probably makes little difference which view is adopted, and in either event the statute is constitutional.

If a delinquent parent thinks that his child-support obligation is excessive or for any other reason believes that he should be relieved from the burden of supporting his children, then it is his duty to petition the appropriate court for modification of the order or for a stay of enforcement. Having failed to take any initiative on his own to obtain such relief, he cannot be suffered to stand silent when haled before the court to answer for his failure to comply with its order. A court order to pay child support must not be "treated as an invitation to a game of hare and hounds, in which the [parent] must [pay] only if cornered at the end of that chase." *United States* v. *Bryan*, 339 U.S. 323, 331 (1950).

N.W.2d 554, 560 (1949) (alimony); *Rossen* v. *Rossen*, 2 Ohio App.2d 381, 384, 208 N.E.2d 764, 767 (1964) (divorce settlement); *Johnson* v. *Johnson*, 319 P.2d 1107, 1108 (Okla. 1957); *Svehaug* v. *Svehaug*, 16 Or.App. 151, 153-155, 517 P.2d 1073, 1075 (1974); *Barrett* v. *Barrett*, 470 Pa. 253, 263-264, 368 A.2d 616, 621 (1977); *Thomerson* v. *Thomerson*, 387 N.W.2d 509, 513 (S.D. 1986); *Leonard* v. *Leonard*, 207 Tenn. 609, 614-616, 341 S.W.2d 740, 743 (1960) (alimony); *Ex parte Padfield*, 154 Tex. 253, 259-260, 276 S.W.2d 247, 251 (1955); *Spabile* v. *Hunt*, 134 Vt. 332, 333-335, 360 A.2d 51, 52 (1976); *Branch* v. *Branch*, 144 Va. 244, 248-251, 132 S.E. 303, 305 (1926).

CONCLUSION

The judgment of the court of appeal should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

No. 86-787

In The
Supreme Court of the United States
October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF ALTA SUE FEIOCK,

Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,

Respondent.

On Writ of Certiorari To The Court of Appeal of California, Fourth Appellate District, Division Three

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED*

The State of California permits the petitioner in a contempt proceeding for the enforcement of child support to rely upon a mandatory presumption the contemnor has the present ability to comply with court ordered child-support payments. This substantive rule of law then shifts the burden of proof to the contemnor to persuade the court he is unable to comply with the obligation of support. The issues before the Court include: May the Court, consistent with constitutional comity, redefine California's historical long-line of decisions holding that civil contempt in California is a crime having as an element the ability to pay? Does the mandatory presumption of Code of Civil Procedure § 1209.5 in the context of California's statutory contempt scheme violate *Ulster County Court v. Allen*, 442 U.S. 140 (1979) and *People v. Roder*, 33 Cal. 3d 491, 189 Cal.Rptr. 501, 658 P.2d 1302 (1983)? Did Phillip Feiock meet his burden of production when he testified he did not have the ability to pay?

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* All parties to the proceeding in the California Court of Appeal, Fourth Appellate District are listed in the caption.

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In The
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BRIEF FOR RESPONDENT

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution,

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . .

West Cal.Ann.C.P. § 1209.5 (1982),

When a court of competent jurisdiction makes an order compelling a parent to furnish support . . . proof that such order was made, filed, and served on the parent . . . and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

West Cal.Ann.C.P. § 1209 (1987),

The following acts or omissions in respect to a court of justice, or proceedings therein, are contempt of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

* * * * * *

5. Disobedience of any lawful judgment, order or process of the court;

West Cal.Ann. Penal Code § 166 (1970),

Every person guilty of any contempt of court, of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any Court of justice, in immediate view and presence of the Court, and directly tending to disrupt its proceedings or to impair the respect due to its authority;

* * * * * *

4. Willful disobedience of any process or order lawfully issued by any Court;

West. Cal.Ann. Penal Code § 270 (1987),

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care

for his or her child, he or she is guilty of a misdemeanor . . .

STATEMENT OF THE CASE

Respondent, Phillip William Feiock, entered into an interlocutory judgment of dissolution with Alta Sue Feiock on January 20, 1976. J.A. 7. The judgment required respondent to pay $35.00 per month child support for each of three children. J.A. 8.

On March 22, 1983 a Uniform Reciprocal Enforcement of Support Act petition was filed. J.A. 5-6. On June 22, 1984, respondent appeared in the Superior Court of California, County of Orange without counsel, and based upon a request of petitioner, the superior court ordered temporary support pending the petition. At that hearing, the court ordered respondent to testify concerning his income and expenses.

Phillip Feiock testified he had been unemployed and had recently started up a business. J.A. 4, R.T., p. 2.[1] This venture followed a failed business which had gone under in February J.A. 10. Respondent had netted $92.00 from the flower business in addition to $10.00 per day in expense money. J.A. 12. After determining "[w]ell, you're going to have to pay some support, you know?" the court ordered Feiock to make payments of $50.00 per month per child ordering him to return in ninety days to review his circumstances. J.A. 14. In the order following

[1]Reference is to the reporter's transcript of June 22, 1984.

the hearing to set child support, the court never found respondent had the present ability to pay. J.A. 15-17.

Ninety days later Feiock again appeared without counsel with the proceeding continued subsequently to November 16, 1984 and February 22, 1985. On the latter date, the proceeding went off-calendar.

Petitioner, through the Orange County District Attorney, filed an order to show cause re contempt on March 5, 1985 alleging six counts of contempt from July 1984 to February 1985. J.A. 18-20. A second order to show cause re contempt was filed on June 12, 1985 by petitioner through the Orange County District Attorney alleging three additional counts of contempt covering the period March 1985 to May 1985. J.A. 21-23. On that date Phillip Feiock appeared in court, was found to be indigent and was provided the services of the Orange County Public Defender. Both orders to show cause were consolidated for trial.

On August 9, 1985, trial was heard before the superior court. The only evidence offered by petitioner was a computer print-out from the Orange County District Attorney's Support Division purporting to evidence respondent's payment history. J.A. 24. It established Phillip Feiock had made payments of $50.00 and $100.00 on August 6, 1985, $150.00 on September 21, 1984, and $150.00 on August 3, 1984. J.A. 25. Petitioner then rested. J.A. 26.

Respondent's non-suit was denied with the court relying on California Code of Civil Procedure section 1209.5. J.A. 26-27. Phillip Feiock then testified in his own behalf. Feiock testified in October 1984 he was unable to make support payments because his partner unilaterally dissolved their partnership and took with her $2,500 in accounts payable without his consent. J.A. 27-28. He then was forced to run the business alone, sleeping in either a garage or van. R.T. 27.[2]

In November 1984 Feiock testified the business was "not doing very well." J.A. 28-29. He then introduced his business and expense balance sheets for January, February and March of 1985. J.A. 29. In March respondent told the court he had lost the garage from which he had been working as a result of insufficient funds to pay the rent. J.A. 30. At that point he lost everything and entered the flower business. J.A. 30-31.

On questioning by counsel for petitioner, Feiock explained his ability to pay for his car and the garage was through creative bookkeeping; paying some business creditors and delaying payments to others. J.A. 33.

Petitioner offered no evidence of Feiock's ability to pay.

The court found respondent in contempt for October, November, December 1984, and March and April 1985. J.A. 35. The court never determined how much Feiock could pay but rather determined "he had the ability to comply, *at least in some regard.*" J.A. 35, emphasis added.

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[2]References are to the reporter's transcript of August 9, 1985.

SUMMARY OF ARGUMENT

Constitutional Arguments

Since 1893, California has abolished the common-law procedural and substantive distinctions between civil and criminal contempt. *Ex Parte Gould*, 99 Cal. 360, 33 P. 1112 (1893). While federal courts and sister states cling to the notion that civil contempt, because of its coercive rather than punitive purpose, does not afford the contemner traditional criminal constitutional protections, California applies the full panoply of those protections to individuals facing any form of contempt sanction.

Thus, contrary to nearly all other jurisdictions, California affords a *civil* contemner the following rights; the privilege against self-incrimination, requiring proof beyond a reasonable doubt in contrast to the lesser standard of clear and convincing evidence, affording in some instances the right to trial by jury, imposing California's criminal accomplice corroboration rule, guaranteeing appointment of counsel to the indigent, and demanding the petitioner establish by evidence the contemner's ability to pay.

The Fourth District Court of Appeal, in advancing this historically long-time of decisional authority, concluded that West Cal.Ann.C.P. § 1209.5's (1982) mandatory presumption conflicted with Phillip Feiock's Fifth Amendment right by relieving the prosecution of their burden to prove each element of a crime beyond a reasonable doubt. Specifically, the court determined as a matter of California substantive law that civil contempt is a purely

criminal proceeding, and ability to pay is an element of that crime.[3]

Although petitioner never contested *either* determination in the court of appeal, they now argue that both interpretations of West Cal.Ann.C.P. § 1209 (1987) were erroneous. From that alleged error, it is then argued the court of appeal misapplied a criminal constitutional principal that the State is prohibited from employing a mandatory presumption shifting the burden of proof to a defendant in a criminal trial.

This Court may determine the court of appeal erred in its view of the Fifth Amendment to the United States Constitution *only* by first finding the court of appeal misinterpreted California substantive and procedural law. Both in the context of full-faith-and-credit owed by this Court to California and the pragmatic conclusion that in California a civil contemner's rights are far greater in scope than those offered by the federal government and sister states, the decision of the court of appeal must be affirmed.

Factual Arguments

When the court of appeal found West Cal.Ann.C.P. § 1209.5 (1982) unconstitutional, the court never reached the second issue presented in the original Petition for Writ of Habeas Corpus filed below. *If* the court had not determined that section 1209.5 violated *Ulster County Court*

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[3]As a matter of Legislative deference, it is important to note the Legislature has never acted to abrogate the consistent line of authority civil contempt is criminal containing as an element the ability to pay by amending section 1209.

v. Allen, 442 U. S. 140 (1978) and had concluded petitioner is correct in asserting the statute merely shifts the burden of production as to an affirmative defense, Phillip Feiock complied with *Ulster County Court*. He did so by producing evidence he *did not* have the ability to pay.

Petitioner then failed to carry its burdens of proof and persuasion by the notable absence of evidence to the contrary. Thus, were the Court to find section 1209.5 constitutional, Phillip Feiock's conviction must still be reversed.

ARGUMENT

I

CODE OF CIVIL PROCEDURE SECTION 1209.5 VIOLATES THE FIFTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT BY IMPOSING A MANDATORY PRESUMPTION IN A CRIMINAL PROCEEDING.

A. California Interprets Code Of Civil Procedure Section 1209 As Being A Quasi-Criminal Proceeding Applying The Full Panoply Of Constitutional Guarantees Afforded Criminal Defendants.

California has enacted three forms of contempt and one ancillary criminal statute to deal with a non-custodial parent's failure to provide support. West Cal.Ann.C.P. § 1209 (1987) defines both civil and criminal contempt. Both direct and indirect, civil and criminal contempt, are treated as criminal prosecutions; the maximum punishment is five days in jail. West Cal.Ann. Penal Code § 166 (1970) defines criminal contempt in a parallel fashion, punishing its violation as a misdemeanor.[4] Finally, where there is the absence of a court order compelling the payment of child support, the Legislature has enacted West Cal.Ann. Penal Code § 270 (1987) punishing failure to wilfully provide for a minor child as a felony or misdemeanor.[5]

Contrary to California's approach, federal and sister state decisions distinguish between civil and criminal contempt and base such distinctions upon the character and purpose of the court's actions. This Court defined the distinction in *Shillitani v. United States*, 384 U.S. 364 (1966), noting in general,

> "when the petitioners carry 'the keys of their prison in their own pockets,' *In re Nevitt*, 117 F. 448, 461 (C.A. 8th Cir. 1902), the action 'is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.'" *Id.*, at 368.[6]

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[4]A misdemeanor is punishable by a fine of $1000 or six months in jail or both. West Cal.Ann. Penal Code § 19 (1987).

[5]The statute distinguished between those non-custodial parents who had earlier adjudicated parentage (felony) from those who had not (misdemeanor). The distinction was found violative of the Equal Protection of the Laws. *In re King*, 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970); *People v. Gregori*, 144 Cal. App. 3d 353, 192 Cal. Rptr. 555 (1983).

[6]The bright line, even in the federal courts, is not as clear as petitioner argues. *Ridgway v. Baker*, 720 F.2d 1409, 1414 (C.A. 5th 1983) poignantly noted, "'when the court imposes a fine or imprisonment for the violation of a child support order, it is punishing for yesterday's contemptuous conduct. This is essentially criminal contempt.'" Moreover, "[t]he state's argu-

(Continued on following page)

See also *Parker v. United States*, 153 F. 2d 66 (C.A. 1st Cir. 1946); *Donovan v. Mazzola*, 716 F. 2d 1226 (C.A. 9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

However, the distinction drawn without California is not drawn within. To the contrary, beginning in the late 1800's, California courts discarded the foregoing distinction in favor of treating all contempt proceedings as criminal. In *Ex Parte Gould*, 99 Cal. 360, 363, 33 P. 1112 (1893), the California Supreme Court commenced the blurring of any distinction between West Cal.Ann. Penal Code § 166 (1970) and West Cal.Ann.C.P. § 1209 (1987) in holding a civil contemner could not be called as a witness against himself, consistent with constitutional protections afforded defendants charged with violation of section 166.

The most pointed abandonment of the civil-criminal distinction was made in *City of Culver City v. Superior Court*, 38 Cal. 2d 535, 541, 241 P.2d 258 (1952),[7]

> "Petitioner's argue at some length concerning the distinction between civil and criminal contempt. From the beginning of this proceeding petitioners have

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(Continued from previous page)

ment that the contemner imprisoned only for civil contempt has, in the aphoristic phrase, 'the keys of his prison in his pocket,' ignores two salient facts: that the keys are available only to one who has enough money to pay the delinquent child support and that, meanwhile, the defendant, whatever the label on his cell, is confined." *Id.*, at 1413-1414.

[7]Only *Amicus* Women's Legal Defense Fund et. al. chose to respond to *City of Culver City* and that response was to acknowledge "California's statutory scheme is admittedly unusual in blurring the procedural distinctions between civil and criminal contempt." Br. of *Amicus Curiae* 12. Petitioner never addressed the implications of *Culver City*.

> urged that they should be advised whether the proceeding was for criminal contempt, civil contempt, or both, and that the proceeding is fatally defective because the two types of contempt were 'scrambled.'
>
> The distinction between civil and criminal contempt is important in the *federal and some state courts* because there are procedural differences, particularly in the safeguards afforded the citee, and also perhaps, differences in the nature of the *intent* which must be shown. [Citations.] *But in California* the proceedings leading to punishment for failure to obey a decree (criminal contempt) and to imprisonment until the omitted act is performed (civil contempt) are *exactly the same.* (Code of Civ. Proc., §§ 1209-1219; see *In re Morris* (1924) 194 Cal. 63, 67.) Although the sections which provide the procedure for both kinds of contempt are in Part III of the Code of Civil Procedure, which is entitled 'Special Proceedings of a Civil Nature,' contempt proceedings are said to be '*criminal in nature*' and those procedural rights and safeguards which *are appropriate to criminal proceedings* are also afforded, *in California*, in civil proceedings." Emphasis added.

Those rights and safeguards include the full panoply of rights afforded criminal defendants under both the federal and California Constitutions. In short, California has elected by statute and decisional law to abolish the distinctions between civil and criminal contempt adopted by other jurisdictions and extend to its citizens far greater protections than the citizens of those jurisdictions enjoy in civil contempt proceedings.

B. The Full Spectrum Of Rights Afforded Criminal Defendants Are Provided In California To Civil Contemners.

The right to appointed counsel for the indigent is a fundamental right compelled in criminal proceedings by

the Sixth Amendment. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). Yet many states deny civil contemners counsel reasoning *Argersinger* has no application to private actions "even though such actions may result in incarceration." *Duval v. Duval,* 114 N.H. 422, 322 A.2d 1 (1974); *Jolly v. Wright,* 300 N.C. 83, 265 SE.2d 135 (1980); *Meyer v. Meyer,* 414 A.2d 236 (Sup.Jud.Ct.Me. 1980); *Retz v. Retz,* 620 Ohio App.2d 158, 405 N.E.2d 313 (1978); *Sword v. Sword*, 59 Mich. App. 730, 249 N.W2d 88 (1976); see e.g., 53 A.L.R.3d 1002.

California by contrast provided counsel to indigents as early as 1961, *In re Shelley,* 197 Cal App.2d 199, 16 Cal. Rptr. 916 (1961), and now guarantees representation by county public defenders or substitute appointed counsel by statute. West Cal.Ann.Gov. Code section 27706 (1987).

Where the exercise of the Fifth Amendment privilege of the United States Constitution not to be called as a witness is *compelled* only in criminal prosecutions and criminal contempt (*Parker v. United States,* 153 F.2d 66 (C.A. 1st Cir. 1946); California has applied the privilege to civil contemners since 1893. *Ex parte Gould,* 99 Cal. 360, 33 P. 1112 (1893); *In re Witherspoon,* 162 Cal. App. 3d 1000, 209 Cal.Rptr. 67 (1984); *Oliver v. Superior Court,* 197 Cal. App. 2d 237, 17 Cal.Rptr. 474 (1961).

Once in trial, the standard of proof to establish the truth of the allegations (guilt) in the majority of jurisdictions is clear and convincing evidence. *United States v. Rylander,* 460 U.S. 752 (1983); *Vertex Distributing v. Falcon Foam Plastics, Inc.,* 689 F. 2d 885 (C.A. 9th Cir. 1982). In California, courts have strictly adopted the criminal standard compelled by the Fifth Amendment of

the United States Constitution of guilt beyond a reasonable doubt. *Ross v. Superior Court,* 19 Cal. 3d 899, 141 Cal.Rptr. 133, 569 P.2d 727 (1977); *Bennett v. Superior Court,* 73 Cal. App. 2d 203, 210, 166 P.2d 212 (1946).[8]

As to whether a civil contemner has a right to a jury trial, the issue is now pending before the California Supreme Court in *Mitchell v. Superior Court,* 43 Cal. 3d 107, 232 Cal.Rptr. 900, 729 P.2d 212 (1987).[9] Prior to the granting of a rehearing, *Mitchell* held that where a *potential* six-month jail term was provided by statute, the right to a jury trial attached. Federal courts by contrast, define contempt as petty when the penalty *actually* imposed does not exceed six months and thus the right to a jury determination is rarely constitutionally compelled. *Taylor v. Hayes,* 418 U.S. 488 (1974).

Finally, California has adopted the accomplice corroboration rule embodied in West Cal.Ann. Penal Code § 1111 (1985). *Bennett v. Superior Court,* 73 Cal. App. 2d 203, 210, 166 P.2d 318 (1946).[10] No other jurisdiction, fed-

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[8]If petitioner is correct and California's civil contempt statute (West Cal.Ann.C.P. § 1209 (1987)) is civil, then the burden of proof beyond a reasonable doubt violates *United States v. Rylander,* 460 U.S. 752 (1983).

[9]Rehearing was granted March 26, 1987.

[10]West Cal.Ann. Penal Code § 1111 (1985) provides, "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

eral or state, has a similar substantive rule applying to civil contempt.

C. California's Interpretation Of Code Of Civil Procedure Section 1209 Encompasses The Ability To Pay As An Element Of The Crime Of Contempt.

Without question there are appellate decisions in California which appear to define the ability to pay, sometimes referred to as willfulness or intent, as both an element and an affirmative defense. But petitioner never having addressed the issue in the court of appeal, and the court of appeal having unmistakably held ability to pay is an element of the crime of civil contempt, the issue as to Phillip Feiock is conclusive.[11]

Relying upon *Nutter v. Superior Court*, 183 Cal. App. 2d 72, 6 Cal.Rptr. 404 (1960), the court of appeal determined, as a matter of California substantive law,

> "Requiring the finder of fact to presume a prima facie case of contempt upon a showing of noncompliance with a valid court order lessens the prosecution's burden of proof by obviating the necessity of proving an *essential element* of the case: *the ability to pay.*" *In re Feiock*, 180 Cal. App. 3d 649, 653, 225 Cal.Rptr. 748 (1986), emphasis added.

There is no ambiguity in the court of appeal's decision below; ability to pay is an element of civil contempt. If the court erred in making the determination that ability to pay is an element of the crime of civil contempt, the

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[11]See petitioner's Writ of Habeas Corpus, respondent Orange County District Attorney's Traverse and petitioner's Reply Brief filed below.

error if any lies in petitioner's failure to raise the substantive issue below, in petitioner's failure to persuade the court of appeal of its truth, or in petitioner's failure to obtain review in the California Supreme Court.

Petitioner is correct in asserting (see Pet. Br. 20-29) that caselaw may be found (see *Oliver v. Superior Court*, 197 Cal. App. 2d 237, 17 Cal.Rptr. 474 (1961)) which alludes to 'ability to pay' as a defense. But these decisions are by appellate courts whose opinions were persuasive authority on the Fourth District Court of Appeal, but were not binding on the court in deciding *In re Feiock*, 180 Cal. App. 3d 649, 225 Cal.Rptr. 748 (1986). *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 20 Cal.Rptr. 321, 369 P.2d 937 (1962).

In re Feiock, supra, addressed the issue head on and resolved it against petitioner. Similiarly, there are decisions such as *Nutter, supra*, and *Warner v. Superior Court*, 126 Cal. App. 2d 821, 273 P.2d 89 (1954) which directly and unambiguously hold,

> "[i]f mere evidence that petitioner was in arrears would support an adjudication of contempt the burden would be cast upon him to overcome that evidence or to justify each and every failure to meet the payments. He would thus be required to affirmatively establish his innocence. 'Willful disobedience of any process or order lawfully issued by any court' is made a misdemeanor by section 166, subdivision 4 of the Penal Code. A proceeding in contempt originated by citation is criminal in nature. (*Hotaling v. Superior Court*, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127.) If the evidence against him does not establish

his guilt the accused has nothing to controvert or explain." *Id.*, at 826.[12]

Finally, the California Supreme Court's decision in *City of Culver City v. Superior Court*, 38 Cal. 2d 535, 541, 241 P. 2d 258 (1952), emphasis added, alluded in dicta to the necessity petitioner *establish* intent as an element of a civil contempt,

> "The distinction between civil and criminal contempt is important in the *federal and some state courts* because there are procedural differences, particularly in the safeguards afforded the citee, and also perhaps, differences in the nature of the *intent* which must be shown."

Thus, while federal decisions appear to be unanimous in treating the ability to pay exclusively as a defense in civil contempt proceedings, *Ridgway v. Baker*, 720 F. 2d 1409 (C.A. 5th Cir. 1983); *TWM MFG. Co., Inc. v. Dura Corp.*, 722 F.2d 1261 (C.A. 6th Cir. 1983); *Donovan v. Baker*, 716 F. 2d 1226 (C.A. 9th Cir. 1983), *cert. den.* — U.S. —, 107 S.Ct. 183 (1986), some states such as California demand that willfulness be established by the petitioner to sustain a finding of civil contempt. *Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E. 2d 657, 663 (1982); *Kinner v. Steg*, 74 Idaho 382, 262 P. 2d 994 (1953). The unmistakable conclusion is that California and the court which last considered the issue determined contrary to petitioner's argument, that ability to pay is an element and not a defense.

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[12]Only *Warner* discerned that West Cal.Ann. Penal Code § 166 (1970), equated universally as co-existent and symmetrical to West Cal.Ann.C.P. § 1209 (1987), demands willfulness as an *element* of contempt.

D. California's Interpretation Of The Elements And Criminal Character Of Code Of Civil Procedure Section 1209 Is Binding On The Court.

Unquestionably the court of appeal resolved that West Cal.Ann.C.P. § 1209 (1987) is quasi-criminal, mandates the provision of criminal constitutional rights, and has as an element, the ability to pay. These are matters of California substantive law whose litigation concluded when the California Supreme Court denied review to petitioner. They may not be *re-litigated* now in a federal forum under the pretext of resolving the constitutionality of the statute. See discussion, *Ante*.

The time and forum to have litigated those issues rested before the lower court and not now. The decision of the court of appeal in *In re Feiock, supra*, is due full-faith-and-credit by this Court. *Oklahoma Tax Comm'n v. Texas*, 336 U.S. 342, 351, fn. 20 (1948); *Knights of Pythias v. Meyer*, 265 U.S. 30 (1923); *California v. Ramos*, 463 U.S. 992, 1014-1015 (1983). See e.g., Wright, *Federal Courts* 2d, 482-491, 495-496.

As the Court noted in *Minnesota v. Probate Court*, 309 U.S. 270, 273 (1960) in comment upon the argument that the Court should re-consider Minnesota's interpretation of State law,

> "This construction is binding upon us. Any contention that construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

Similarly in deciding the overbreadth of West Cal.Ann. Penal Code § 647(e) (1987) in *Kolender v. Lawson*, 461

U.S. 352, 355-356, n. 4 (1983), the Court again pointed to the *Pythias* line of cases,

> "[i]n *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973), we held that 'for the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation "we must take the statute as though it read precisely as the highest court of the State has interpreted it." *Minnesota v. Probate Court*, 309 U.S. 270, 273 (1940).' The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People v. Solomon*, 33 Cal. App. 3d 429, 108 Cal. Rptr. 867 (1973), that the State Supreme Court has refused review, and that *Solomon* has been the law for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of § 647(e)."

In sum, whether predicated upon independent state grounds[13] or simply the development of substantive law affecting the prosecution of civil contempt, California has adopted and nurtured the basic premise underlying civil contempt that it is a criminal proceeding which demands by State compulsion and interpretation all of the rights inuring to a criminal defendant charged with a crime. California's right to interpret the law of the State and to afford greater constitutional protections based upon that interpretation must be afforded full-faith-and-credit by this Court. *California v. Ramos*, 463 U.S. 992, 1014-1015 (1983); *Oklahoma Tax Comm'n v. Texas*, 336 U.S. 342, 351, n. 20 (1948); *Knights of Pythias v. Meyer*, 265 U.S. 30 (1923).

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[13]See gen. *Michigan v. Long*, 463 U.S. 1032, 1040-1042 (1982); *California v. Ramos*, 463 U.S. 992, 997 n. 7 (1982).

E. If The Crime Of Civil Contempt Has As An Element The Ability To Pay A Fortiori The Court Of Appeal Correctly Applied Ulster County Court v. Allen.

Conceptually, the Court of Appeal determined that civil contempt in California is a criminal proceeding including within its definition the element of the ability to pay. The court then analyzed section 1209.5 in light of *Ulster County Court v. Allen*, 442 U. S. 140 (1979) and *People v. Roder*, 33 Cal. 3d 491, 189 Cal.Rptr. 501, 658 P.2d 1302 (1983), finding it violative of Phillip Feiock's Fifth Amendment right. Neither petitioner nor *amicus* forcefully argue the constitutionality of section 1209.5 as applied to criminal contempt. But *if* civil contempt were a crime in the traditional sense (i.e., if West Cal.Ann.C.P. § 1209.5 (1982) applied to the element of willfulness contained in West Cal.Ann. Penal Code § 166 (1970)), the mandatory presumption of section 1209.5 clearly would violate both *Ulster* and *Roder*.

The position advanced by petitioner has as its linchpin the civil nature of contempt. Petitioner's entire theory presumes that *Martin v. Superior Court*, 17 Cal. App. 3d 412, 95 Cal.Rptr. 110 (1971) relied upon a line of decisional authority applicable solely to criminal prosecutions and that civil contempt in California is civil. See Pet. Br. 29-35. Thus it is reasoned, if civil contempt in California is "civil," then *Martin* is good law and *Feiock* is in error. The same syllogism holds true in reverse however. If the court of appeal, in following *City of Culver City v. Superior Court*, 38 Cal. 2d 535, 241 P.2d 258 (1952), is correct and civil contempt is criminal, it follows that the court correctly applied *Ulster* in nullifying *Martin*.

Since this Court, as a matter of federalism, is limited by the doctrine of full-faith-and-credit and must accept California's determinations that civil contempt is a criminal proceeding having ability to pay as an element of that action, the thrust is that petitioner is *precluded* from relitigating the very issue which underlies their entire constitutional argument. The court of appeal determined,

> "Code of Civil Procedure section 1209.5 establishes a mandatory presumption within the meaning of *Ulster* and *Roder*. [Citation.] It requires the inference rather than suggesting the inference may logically follow. The trier of fact is *required* to find a prima facie case of contempt whenever a valid court order is not obeyed. Although rebuttable, the presumption actually shifts the burden of proof to the accused." *In re Feiock*, 180 Cal. App. 3d at 655, 225 Cal.Rptr. 748 (1986).

That determination, applied to a criminal offense, is a matter of state interpretation and is correct.

II

CODE OF CIVIL PROCEDURE SECTION 1209.5 VIOLATES ULSTER COUNTY COURT V. ALLEN BY IMPOSING A MANDATORY PRESUMPTION RELIEVING THE PROSECUTION OF ITS BURDEN OF PROVING EACH ELEMENT OF THE CRIME OF CONTEMPT BEYOND A REASONABLE DOUBT.

A. The Court Of Appeal Correctly Determined That Code Of Civil Procedure Section 1209.5 Substitutes A Mandatory Presumption For Proof Of The Element Of Ability To Pay.

The court of appeal analyzed West Cal.Ann.C.P. § 1209.5 (1982), determining it "establishes a mandatory

presumption within the meaning of *Ulster* and *Roder*." *In re Feiock*, 180 Cal. App. 3d 649, 654, 225 Cal.Rptr. 748 (1986). Section 1209.5 provides,

> "[w]hen a court of competent jurisdiction makes an order compelling a parent to furnish support . . . proof that such order was made, filed, and served on the parent . . . and proof of noncompliance therewith shall be prima facie evidence of a contempt of court."

West Cal.Ann.Evid. Code § 602 (1966) further provides,

> "[a] statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."

In sum, section 1209.5, as applied to the element of ability to pay in contempt, has "the effect of shifting the burden of persuasion to the defendant." *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). Beyond merely shifting the burden of persuasion, section 1209.5 relieves the prosecution of establishing "proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). As the court of appeal concluded,

> "It requires the inference rather than suggesting the inference may logically follow. The trier of fact is required to find a prima facie case of contempt whenever a valid court order is not obeyed. Although rebuttable, the presumption actually shifts the burden of proof to the accused." *In re Feiock*, 180 Cal. App. 3d 649, 654, 225 Cal. Rptr. 748 (1986).

Petitioner's alternative theory, should the court be bound by California's conclusion that section 1209 *is criminal*, is to argue that the constitutional violation is minimal. It is argued it is minimal for two reasons; first the statute merely requires the contemner come forward with

any evidence shifting the burden to the prosecution, and second, contempt is only punishable by a term of five days for each violation. Neither passes constitutional muster.

The showing a contemner need make is more than is constitutionally permitted under *Ulster* and *Sandstrom* and, as was amply demonstrated herein, does not operate in practice to shift the burden to the prosecution. First, petitioner misconstrues the nature of section 1209.5 when it is argued that the statute is constitutional since "if the citee raises *any* reasonable doubt about the existence of the presumed fact, the presumption disappears." Pet. Br. 44.

The constitutionality of that procedure as exemplified by *Martin v. Ohio,* — U.S. —, 107 S.Ct. 1098 (1987) is convincing only where the burden arises in the context of an affirmative defense.[14] When the presumption operates to place upon a criminal defendant the burden of proof of *negating* the existence of a *presumed* fact by raising a reasonable doubt, precisely the presumption contained in West Cal.Ann.C.P. § 1209.5 (1982), the prosecution is improperly relieved of establishing by evidence each fact necessary to prove guilt beyond a reasonable doubt. As was noted in 2 Jefferson, *California Evidence Benchbook* 2d, Presumptions § 46.4, analyzing presumptions affecting a criminal action, such a presumption "would remove the duty of the prosecution to prove be-

[14]*Martin* only reached the issue of shifting burdens of proof after concluding the State had met its burden of proving " 'every fact necessary to constitute the crime with which he is charged.' " *Martin v. Ohio, supra* at 1101; *In re Winship,* 397 U.S. 358, 364 (1970).

yond a reasonable doubt *every fact* essential to the offense or defendant's guilt."

In short, the *any evidence* theory adopted by petitioner ignores the necessity the prosecution prove each *fact* necessary to prove guilt of each *element* beyond a reasonable doubt. As to the *element* of ability to pay, *the presumption* is the 'sole and sufficient' basis relied upon by the prosecution to obtain a conviction. As was amply demonstrated herein, the non-suit was denied Phillip Feiock at the close of petitioner's presentation *based solely* upon the presumption contained in section 1209.5. No other evidence as to ability to pay was admitted by petitioner in its case-in-chief nor in rebuttal to Phillip Feiock's testimony he could not pay. The presumption violates Phillip Feiock's Fifth Amendment rights.

Secondarily, assuming the presumption does not relieve the prosecution of its burden of proof, it fails to satisfy the test in *Ulster County Court v. Allen.*[15] A presumption is only as good as the inferences drawn from the facts. As the Court pointed out in *Maggio v. Zeitz,* 333 U.S. 56 (1947), an inference,

> "which might be entirely permissible in some cases, seems to have settled into a ridged presumption which it is said the lower courts apply without regard to its reasonableness in the particular case." *Id.* at 64-65.

Precisely upon that basis, the court of appeal analyzed section 1209.5, finding knowledge of an order lawfully

[15]Petitioner relies on the "rational connection" test of *Leary v. United States,* 395 U.S. 6 (1969). However, that test is only employed where the presumption is permissive, not mandatory. *Ulster County Court v. Allen, supra,* at 159-160.

made in the past did not compel the inference that Phillip Feiock had the present ability to pay beyond a reasonable doubt. Or as this Court explained in *Maggio v. Zeitz, supra,* "the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another." *Id.* at 66.

Thus the court of appeal, in order to save the statute's constitutional infirmity, "construed [the statute] as authorizing a permissive inference, but not a mandatory presumption." *In re Feiock, supra,* at 655. In fact, the court merely followed earlier decisions explicitly determining what other courts had accomplished implicitly by ignoring the mandatory nature of section 1209.5.

> "Where the ability of the contemner to comply with the order has already been determined by the court, it has been held that it is only necessary that the affidavit allege the making of the order and the refusal to comply with it. [Citations]. The cases cited in support of the last statement both involved an affidavit filed soon after the order or judgment was entered. In such cases there is every reason for holding that the statement of the entry of the order or judgment is sufficient where the question of ability to comply with the order was there determined." *Mery v. Superior Court,* 9 Cal. 2d 379, 380, 70 P.2d 932 (1937).

But where,

> "the affidavit in question was filed more than ten years after the order . . . [it is] no sound proof of that fact." *IBID.*

The only determination as to Phillip Feiock's ability to pay was on July 1, 1976. Not at the June 22, 1984 hearing nor anytime thereafter did a court make a finding

of ability to pay. On August 9, 1985, nine years later, the court relied upon the presumption of West Cal.Ann.C.P. § 1209.5 (1982) to meet the prosecution's burden of proving ability to pay beyond a reasonable doubt. Both in fact and law, the presumption operated to relieve the prosecution of their burden of proof and wrongfully convict Phillip Feiock.

In the alternative, petitioner argues the Fifth Amendment of the United States Constitution should not apply when the offense is petty. Although West Cal.Ann.C.P. § 1209 (1987) provides imprisonment of five days for each violation, the prosecution rarely proceeds until numerous counts (sixty days per year) are aggregated. As evident to Phillip Feiock, he faces twenty-five days in jail, and this only after the trial court acquitted him of other counts which potentially could have led to further incarceration. Moreover, California has concluded that *any* potential incarceration raises constitutional protections afforded criminal defendants.[16] *Ross v. Superior Court,* 19 Cal. 3d 899, 913, 141 Cal.Rptr. 133, 569 P.2d 727 (1977). The petty nature of the offense, if at all, does not relieve the prosecution of its burden to prove all the elements of the crime.

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[16]Contrast the argument that the crime of civil contempt is petty with the exhortations to uphold the statute as a "productive and necessary" tool in the arsenal to compel child support payments. Pet. Br. 48.

III

THE PROSECUTION FAILED TO CARRY THEIR BURDEN OF PERSUASION AND PROOF BY FAILING TO INTRODUCE ANY EVIDENCE OF ABILITY TO PAY AFTER PHILLIP FEIOCK MET HIS BURDEN OF PRODUCTION BY TESTIFYING HE DID NOT HAVE THE ABILITY TO PAY.

A. Phillip Feiock Met His Burden Of Production.

Phillip Feiock testified following the denial of his non-suit that he did not have the ability to comply with the court's order. His testimony included descriptions of living in his van and rented garage trying to run a business on a shoestring. Contrary to petitioner's description of a father 'living high off the hog' flaunting the court's order and the needs of his children, Feiock described losing the garage due to an inability to pay rent, failed business ventures, and dodging creditors. He submitted his books to the court for additional scrutiny. Finally, when he could, he paid the support he owed. J.A. 26.

Never did the trial court discredit Feiock's testimony, find it untruthful, or perjurious. Yet, following Feiock's successful production of evidence meeting his 'burden of production' as urged by petitioner, petitioner continued to rely on section 1209.5, and the court sustained the contempt citation.

B. The Trial Court Erred In Finding Phillip Feiock In Contempt.

If *arguendo* West Cal.Ann.C.P. § 1209.5 (1982) is constitutional in California's statutory contempt scheme, then

Phillip Feiock met his burden and the prosecution failed theirs. In contrast to respondent's detailed testimony, no evidence was offered by petitioner to contest or meet their burden of proof that Feiock could pay the ordered child support. It is precisely their failure to admit *any* evidence of ability to pay which glaringly establishes how the mandatory presumption operates in California family courts.

If *arguendo* petitioner is correct and the statute requires a citee to do little to avoid the presumption, Feiock met that *minimal* burden. The contempt finding should be annulled.

———o———

CONCLUSION

For the foregoing reasons the decision of the court of appeal should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

No. 86-787

In The

Supreme Court of the United States

October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR COUNTY OF ORANGE, CALIFORNIA, ACTING ON BEHALF OF ALTA SUE FEIOCK,
Petitioner,

vs.

PHILLIP WILLIAM FEIOCK,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. CALIFORNIA HAS NEVER ABANDONED THE SUBSTANTIVE DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPT.

Foremost among the misstatements of the law suffusing Respondent's brief is the remarkable assertion, fundamental to Respondent's position, that "California has abolished the procedural *and* substantive distinctions between civil and criminal contempt." (Emphasis added.) Resp. Br. at 6. California has done nothing of the kind.

Respondent suggests that *Ex Parte Gould,* 99 Cal. 360, 33 P.1112 (1893), "discarded the distinction" between civil and criminal contempts; however, he overlooks the reasoning of the case:

> " 'Although the alleged misconduct of the defendant occurred in the progress of a civil action, the proceedings to punish them for such misconduct is no part of the process in the civil action, but is in the nature of a criminal prosecution. *Its purpose is not to indemnify the plaintiff* for any damage he may have sustained by reason of such misconduct, *but to vindicate the dignity and authority of the court.* It is a special proceeding, criminal in character, in which *the state is the real plaintiff or prosecutor.*' " (Emphasis added.) *Ex Parte Gould, supra,* 99 Cal. at 362, 33 P.1112.

Respondent apparently has now abandoned his earlier reliance on *Bell v. Hongisto,* 501 F.2d 346 (9th Cir. 1974) (Br. in Opp. to Cert. at 7-8); however, *Bell* provides a perspicuous example of a court that understands the distinction drawn in California between civil and criminal contempts. Following the language brought to this Court's attention by Respondent, the *Bell* court writes,

> "Respondent contends that Bell's argument regarding a right to equal treatment with 'criminal' defendants is eviscerated by the fact that Bell was not held in 'criminal' contempt [under Penal Code, § 166]. It is true that Bell was convicted under § 1209 and § 1211,

> Code Civ. P., not under § 166, Penal Code, and hence was not a 'criminal' under the statutory terminology. *But Bell's contempt was essentially 'criminal'* in nature, even if not 'criminal' by virtue of § 166, Penal Code, *because the purpose of the contempt sanction in this case was punitive rather than compensatory or coercive.* See *Morelli v. Superior Court* . . . 1 Cal.3d 328 [,333], 82 Cal. Rptr. 375, 461 P.2d 655 (1969); [citations]." (Emphasis added.)
>
> *Bell v. Hongisto, supra,* 501 F.2d at 353.

Obviously, *Bell* and *Gould* each relies upon the substantive distinction between civil and criminal contempt by examining the *purpose* for which sentence is imposed. Neither teaches, as Respondent would have this Court believe, that the substantive distinction has been "abolished." Rather, the cases hold that "where the object of the proceedings is to vindicate the dignity or authority of the court, they are regarded as criminal in character even though they arise from, or are ancillary to, a civil action." *Morelli v. Superior Court,* 1 Cal.3d 328, 333, 461 P.2d 655, 82 Cal. Rptr. 375 (1969). On the other hand, "[w]here the primary object of contempt proceedings is to protect the rights of litigants, the proceedings are regarded as civil in character." *Id.*

Respondent chooses to ignore the significance of the statements made by the unanimous California Supreme Court in *Morelli* and the rather lucid remark made by the court in *People v. Batey,* 183 Cal.App.3d 1281, 1284, 228 Cal. Rptr. 787 (1986), cert. den. — U.S. —, 107 S.Ct. 1569, 74 L.Ed.2d 761 (1987), to the effect that "[*s*]*tate and federal* case law clearly distinguish criminal and civil contempts." (Emphasis added.) Pet. Br. at 31. Respondent's failure even to acknowledge the existence of *Batey* and *People v. Derner,* 182 Cal.App.3d 588, 227 Cal. Rptr. 344 (1986), both of which are discussed at length in Petitioner's brief on the merits (at 29-35), is revealing. Respondent simply cannot explain away their obvious meaning.[1] Nor can he refute the principle stated in *Warner v. Superior Court,* 126 Cal.App.2d 821, 824-825, 273 P.2d 89 (1954), directly on point, which is set forth on page 34 of Petitioner's brief but which bears repeating here:

> "A proceeding in contempt for failure to pay . . . support money is *primarily* a method of collecting money that cannot be realized through execution process. It is *a coercive measure designed to compel obedience to the court's orders* rather than one to vindicate the authority of the court by inflicting punishment." (Emphasis added.)

Respondent also misconstrues the case of *City of Culver City v. Superior Court,* 38 Cal.2d 535, 241 P.2d 258 (1952), to the extent he believes it demonstrates an "abandonment of the [substantive] civil-criminal distinction." Resp. Br. at 10. Of course, to read only the portion of the majority opinion Respondent recites in his briefs (Br. in Opp. at 5; Resp. Br. at 10-11) is to invite misconstruction. Without indicating he is doing so, Respondent omits, *from within* the section of the text he quotes, language which supplies meaning to the court's remarks. In that language, the issue is framed:

> "[Petitioners] say, vaguely, that they have been deprived of constitutional rights *because they were not informed* whether the contempt proceeding had as its object the[ir] punishment . . . or the enforcement of the injunction, but they suggest no respect in which the failure to so inform them affected them adversely at all." (Emphasis added.)
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> *Culver City, supra,* 38 Cal.2d at 541, 241 P.2d 258.

Thus, contrary to the impression left by Respondent, the *Culver City* court was not making some abstract, sweep-

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[1] If *all* contempts in California are substantively "criminal" as Respondent says, how does he explain the failure of the double jeopardy claims in *Batey* and *Derner*?

ing pronouncement "abolishing" civil contempt. It was ruling on a vaguely phrased but specific question concerning an alleged constitutional defect in the procedures under which the petitioners had been prosecuted for contempt. The petitioners were complaining that they had not been provided adequate notice of the *nature* of the charges against them and that, as a result, they had been denied *procedural* due process. (Cf. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).) The court, however, determined petitioners' constitutional contentions to be meritless because, generally, the same "procedural rights and safeguards which are appropriate to criminal contempt proceedings are also afforded, in Californ[i]a, in civil contempt proceedings." *Culver City, supra,* 38 Cal.2d at 541, 241 P.2d 258. While it noted that there *is* a distinction between civil and criminal contempt, the court found that the distinction was "not of importance" in evaluating petitioners' challenge to the *procedures* utilized against them. *Id.*, at 541-542. *Nothing* was abandoned in *Culver City.*

California has long recognized, as Mr. Justice Brewer wrote for this Court in *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 326 (1904), that "[a] contempt proceeding is *sui generis.* It is criminal in its nature." Thus, California courts have held that "[a] contempt proceeding arising out of a civil action is, *in a broad sense*, regarded as a criminal proceeding." (Emphasis added.) *In re Shelley*, 197 Cal.App.2d 199, 202, 16 Cal. Rptr. 916 (1961). *Because civil contemners can be deprived of their liberty by incarceration*, California has chosen to require that they be accorded many (but not all)[2] of the same *procedural*

[2] Respondent continues to rely upon *Mitchell v. Superior Court*, 43 Cal.3d 107, 729 P.2d 212, 232 Cal.Rptr. 900 (1987) to

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safeguards guaranteed to defendants in criminal cases. *People v. Derner, supra,* 182 Cal.App.3d at 591, 227 Cal. Rptr. 344.[3]

The citee in a civil contempt proceeding must therefore be formally notified of the charges against him and of the time and place set for hearing. *Albrecht v. Superior Court*, 132 Cal.App.3d 612, 183 Cal. Rptr. 417 (1982). His "right . . . to be heard in his [own] defense is the same as that which is secured to a person accused of a crime" (*In re Shelley, supra,* 197 Cal.App.2d at 202, 16 Cal. Rptr. 916), and he cannot be compelled to be sworn as a witness against himself. *In re Witherspoon*, 162 Cal.App.3d 1000, 209 Cal. Rptr. 67 (1984). He, further, has a right to counsel (*In re Shelley, supra*, 197 Cal.App.2d at 202, 16 Cal. Rptr. 916; Cal. Govt. Code, § 27706) and, in a child support case, a right "to *proof of a prima facie case of contempt* by competent evidence beyond a reasonable doubt."[4] (Em-

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support his specious argument that "the full spectrum of rights afforded criminal defendants are provided in California to civil contemners." Resp.Br. at 11, 13. However, California Rules of Court, rule 976(d), states: "Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of . . . rehearing . . . shall be published." Rehearing was granted by the California Supreme Court on March 26, 1987, without additional order. Thus, Respondent's argument is based upon a superseded opinion.

[3] "It has been said . . . that procedural rights and safeguards which are appropriate to criminal proceedings . . . are also accorded the contemnor in civil contempt proceedings. *This statement is true to some extent* . . . . However, certain procedural rights enjoyed by a person charged with the crime of contempt are denied to a person charged with civil contempt. The right to trial by jury is the most prominent example." (Emphasis added.) 4 Markey, *Cal. Family Law Prac. & Proc.*, § 50.52[2], pp. 5-141 and 5-142 (1987). (See Pet.Br. at 45.)

[4] Respondent contends that, in all contempt proceedings, "California [] courts have strictly adopted the criminal standard *compelled by the Fifth Amendment of the United States Con-*

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phasis added; original emphasis omitted.) Hogoboom & King, *Cal. Prac. Guide: Fam. Law 1*, § 18.29 (1987); Cal. Code of Civil Procedure (C.C.P.), § 1209.5.[5]

However, while California has elected to provide civil contemners "greater [procedural] protections than th[ose] afforded by the [f]ederal government or other states" (Br. in Opp. at 3), California still distinguishes civil contempt from criminal for substantive purposes. As Judge Christian Markey, Jr., has explained in his definitive treatise on California Family Law, "Appellate courts often characterize a civil contempt proceeding as 'criminal,' 'quasi-criminal,' or 'criminal in nature' [; *however, t]he proceeding is not a criminal action or a prosecution for crime*. . . By referring to the proceedings as criminal, the courts mean merely that certain procedural rules applicable in criminal actions also apply in a civil contempt proceeding." (Emphasis added.) 4 Markey, *Cal. Family Law Prac. & Proc., supra*, § 50.52[2], p. 50-141, citing *Bridges v. Superior Court*, 14 Cal.2d 464, 473-477, 94 P.2d

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stitution of guilt beyond a reasonable doubt." (Emphasis added.) Resp.Br. at 12-13. However, courts have utilized the reasonable doubt standard in civil contempt proceedings because such proceedings can result in incarceration, *not* because the Fifth Amendment compels it. *Ross v. Superior Court*, 19 Cal.3d 899, 913, 569 P.2d 727, 141 Cal.Rptr. 133 (1977); *In re Coleman*, 12 Cal.3d 568, 572, 526 P.2d 533, 116 Cal.Rptr. 381 (1974).

[5] It is undisputed that Respondent was properly served with the two Orders to Show Cause (J.A. 18-20; 21-23) and, thus, that he was formally notified of the contempt charges filed against him. He was given an opportunity to be heard at the contempt hearing on August 9, 1985, but only after he was advised that he had a right not to be sworn as a witness (J.A. 27). He was represented at the hearing by appointed counsel (J.A. 24-38; 39), and his contempt on five of the nine counts was proved beyond a reasonable doubt, even after his own defensive testimony was considered and weighed by the court (J.A. 35; cf. *Ross v. Superior Court*, 19 Cal.3d 899, 913, 569 P.2d 727, 141 Cal.Rptr. 133 (1977)). Thus, *none* of Respondent's procedural rights was violated.

983 (1939), revd. on other grounds *sub nom. Bridges v. California*, 314 U.S. 252 (1941).

In re Morris, 194 Cal.63, 227 P.914 (1924), which is cited with approval in the *Culver City* opinion, *supra*, 38 Cal.2d at 541, 241 P.2d 258, explains:

> "'*Proceedings for contempt are of two classes*, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce.' . . . *Both of these classes of contempts are contemplated by and provided for in the provisions of our Code of Civil Procedure.*" (Emphasis added.)
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> *In re Morris, supra*, 194 Cal. at 66-67, 227 P. 914.[6]

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[6] Amicus Women's Legal Defense Fund, et al., expresses some uncertainty concerning the procedures utilized below, writing that "the district attorney *presumably* was acting under California's civil contempt statute, Cal.Civ.Proc.Code § 1209, in issuing the orders to show cause to respondent." (Emphasis added.) Br. of Amicus Curiae at 13. Similarly, Amicus notes that "[t]he orders to show cause contain no reference to California's criminal contempt statute, Cal. Penal Code § 166," and then tentatively concludes, "[h]ad the district attorney intended to proceed under that statute, he *presumably* would have filed a criminal complaint specifically citing the statute. (Emphasis added.) Br. of Amicus Curiae at 13, fn. 10.

Lest there be any confusion, Cal.Govt.Code, § 100(b) requires that "[t]he style of all process shall be 'The People of the State of California,' and *all prosecutions* shall be conducted in their name and by their authority." (Emphasis added.) Our state Supreme Court has explained that the word "prosecu-

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Because civil and criminal contempts both utilize the procedures set forth in C.C.P., §§ 1209-1222, California "courts look to what is primarily sought to be accomplished by imposing sentence in order to determine whether to consider the contempt civil or criminal." *People v. Derner, supra,* 182 Cal.App.3d at 592, 227 Cal. Rptr. 344. This is in accord with federal practice. (See, e.g., *Shillitani v. United States,* 384 U.S. 364 (1966).) Here, where Respondent's sentence was *suspended* and he was advised by the

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tions" as used in § 100 "signifies only prosecutions of a public or criminal character and concerns the formal accusation of offenders by presentment or indictment by a grand jury or by information." (Quotation marks in original omitted.) *Bridges v. Superior Court, supra,* 14 Cal.2d at 476, 94 P.2d 983. (Cf. Cal.Govt.Code, § 26500; *Hicks v. Orange County Bd. of Supervisors,* 69 Cal.App.3d 228, 138 Cal.Rptr. 101 (1977); *People v. Municipal Court,* 27 Cal.App.3d 193, 103 Cal.Rptr. 645 (1972).) The instant contempt proceeding was *not* styled, "The People of the State of California" v. Phillip William Feiock. The Petitioner was Alta Sue Feiock, on whose behalf the district attorney continues diligently to act, as required by Cal.C.C.P., § 1680 (J.A. 3-6).

Additionally, it should be noted that Cal.C.C.P., § 1672.5 vests "[j]urisdiction of all proceedings [under California's Revised Uniform Reciprocal Enforcement of Support Act] in the *superior* court." (Emphasis added.) § 1462 of Cal.Penal Code vests jurisdiction over misdemeanor offenses in the municipal and justice courts. "[A] superior court has no jurisdiction over misdemeanor offenses [except w]here a defendant is charged with both a felony and a misdemeanor." *In re McKinney,* 70 Cal.2d 8, 13, 447 P.2d 972, 73 Cal.Rptr. 580 (1968). Manifestly, the contempt proceedings here, which were conducted in the Superior Court of the State of California (J.A. 24; 39), which has no jurisdiction over singular misdemeanor offenses, were not brought under § 166 of the Penal Code.

Finally, *In re Morris, supra,* 194 Cal. at 72-73, 227 P.914, holds that "whether [a] particular act is punishable as a [misdemeanor crime] under § 166 of the Penal Code, is immaterial to any inquiry arising in a contempt proceeding under [C.C.P. §] 1209. . . . [S]ection 166 of the Penal Code is a . . . cumulative [remedy] . . . in addition to the remedies provided by the title of the Code of Civil Procedure on contempts." Here, this "cumulative remedy" was not utilized.

court to "get in touch . . . [i]f you get into difficulty [because] we've got 25 days hanging over your head" (J.A. 38), the purpose of the sentence was unmistakably *civil* under state *and* federal standards.

2. FOR PURPOSES OF FOURTEENTH AMENDMENT ANALYSIS, CALIFORNIA COURTS ARE NOT AT LIBERTY TO REDEFINE AS CRIMINAL WHAT, UNDER FEDERAL LAW, IS A CIVIL CONTEMPT.

It is axiomatic "that states are free to provide greater protections in their criminal justice system then the Federal Constitution requires." *California v. Ramos,* 463 U.S. 992, 1013-1014 (1983). Indeed, the same is true in civil matters. However, it has never been held that states are free to base such "greater protections" upon the *federal* Constitution, as occurred in this case. (See Pet. Cert. at 8, fn. 3; *Oregon v. Kennedy,* 456 U.S. 667, 670-671 (1982).)

To determine whether C.C.P. § 1209.5 violates the due process clause of the Fourteenth Amendment, one must define the subject matter of the statute in federal terms. Under federal law, the contempt here involved is indubitably *civil.* Therefore, the proper constitutional inquiry is whether there was a "rational connection" between the fact proved (ability to pay on June 22, 1984) and the ultimate fact presumed (a wilful failure to pay based on a continuing ability during the twelve months following the June 22, 1984 child support order). *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 28 (1976) (quoting *Mobile, J.&K.C.R. Co. v. Turnipseed,* 219 U.S. 35, 43 (1910)). *For purposes of Fourteenth Amendment analysis,* California courts are not at liberty to disregard this court's line of *civil* cases by simply redefining the contempt on their own terms as "criminal." Consequently, when the Court of Appeal subjected Cal. C.C.P., § 1209.5

to scrutiny under this Court's line of *criminal* cases and declared the statute unconstitutional on the ground that it creates a mandatory presumption within the proscription of *Ulster County Court v. Allen*, 442 U.S. 140 (1979), the court erred—and erred as a matter of federal constitutional law.

3. THIS COURT IS BOUND BY CALIFORNIA SUPREME COURT PRECEDENT WHICH, IN CONSTRUING CALIFORNIA'S CONTEMPT STATUTES, HAS HELD INABILITY TO COMPLY WITH A VALID COURT ORDER TO BE AN AFFIRMATIVE DEFENSE ON WHICH THE CITEE HAS THE BURDEN OF PRODUCING EVIDENCE.

Once again, Respondent stakes out an untenable position. First he concedes that "caselaw [sic] may be found . . . which alludes to 'ability to pay' as a defense." Resp. Br. at 15. However, he dismisses this case law by stating inaccurately that "these decisions are by appellate courts whose opinions . . . were not binding on the . . . Fourth District Court of Appeal." *Id.* Respondent, thus blithely ignores the six California *Supreme Court* cases cited in Petitioner's Brief on the merits (at 23) which treat the question of ability to pay wholly as a matter of affirmative defense.

For example, in *Galland v. Galland*, 44 Cal. 475 (1872) (Pet. Br. at 23-24), the plaintiff had obtained a judgment against the defendant requiring him to pay support in the sum of eighty dollars on the first of each month for herself and her infant child. Nearly two years later, defendant began to fall behind in his payments. An arrearage accumulated over an additional two-year period of time, at which point "the plaintiff presented an application to the . . . court, setting forth the failure and refusal of the defendant to pay, and praying that he might be . . . required to answer [ ] for [ ] contempt." *Id.* 44 Cal. at 477.

No allegation of ability to pay was made by the plaintiff in her affidavit, nor did the Supreme Court determine that such an allegation was required. Rather, the court reasoned, " 'If it appear[s] that the debtor is unable to pay the sum [previously] ordered to be paid, that may be deemed *a sufficient excuse when he appears to answer* for *apparent* contumacy.' " (Emphasis added.) *Id.*, 44 Cal. at 478. The court concluded, "where one is called before a court to answer for contempt for not doing an act which he has been adjudged to do, *inquiry may properly be had* as to whether it is still in his power to do it." (Emphasis added.) *Id.*

Similarly, and even more explicitly, the California Supreme Court designated ability to pay as solely a matter for the defense in the case of *In re McCarty*, 154 Cal. 534, 98 P.540 (1908). There, the contemner "insist[ed] . . . that the affidavit of his [former] wife . . . under which the proceeding for contempt [for failure to pay *alimony* had been] initiated[,] was fatally defective because it did not contain a statement that [he] was able to pay." *Id.*, 154 Cal. at 536, 98 P.540. The court responded,

> "We do not think there is any merit in this position. The court in the original order . . . found [he] had the ability to pay his wife ninety dollars a month, and ordered him to make such payment. . . . [I]t is only necessary that the affidavit, which constitutes the basis for judicial action in such a [contempt] proceeding, should show the making of the order . . . and the fact of the refusal of a husband to make payment as so ordered. *It is not necessary for a wife on the hearing of a contempt* proceeding for nonpayment . . . *to prove anything more than the making of the order and disobedience of it by her husband* in refusing to pay the amount which the court found he had the ability to [pay] when it made the order. *She makes a prima*

facie case at the hearing by producing the original order, and by proof of the refusal of her husband to make payment according to its terms, and this being true she is not required to set forth in her affidavit anything more than she is required to prove. . . . [*A*]*n opportunity is given him to purge himself of contempt by presenting any legitimate excuse he may have, and if his excuse is that since the making of the original order he has become unable to pay . . ., it is incumbant upon him . . . to show why* for any reason he has not obeyed the order, and *it is his duty to do so as a matter of defense.*" (Emphasis added.)

In re McCarty, supra, 154 Cal. at 537, 98 P.540.

McCarty's rule demoninating ability to pay as a defensive matter continues to control in California. However, it may have appeared at one time that the rule was being eroded.[7] In *Mery v. Superior Court,* 9 Cal.2d 379, 70 P.2d 932 (1937), the plaintiff wife had obtained an order for *alimony* in February, 1926. By late 1936, $10,860.00 had accrued on that order, but only $8,860.00 had been paid. The wife then had her former husband cited for contempt, based on the original 1926 order. The Supreme Court held that, where there had been more than ten years since the original order, the wife was required to allege facts in her affidavit showing the delinquent spouse's ability to pay.[8]

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[7] While it may have *seemed* so, the California Supreme Court continued to apply the general rule, holding inability to comply with a valid court order to be wholly a defensive matter. For instance, in *Donovan v. Superior Court,* 39 Cal.2d 848, 855-856, 250 P.2d 246 (1952), the Supreme Court wrote, "Petitioner [] finally contend[s] that there was no showing as to [her] ability to comply with those portions of the injunction which directed [her] to remove certain apartments and reconvert the main structure. . . . [However, *Petitioner*] *had the burden of showing her inability.* [Citations.]" (Emphasis added.) Even the contemners in *City of Culver City v. Superior Court, supra,* went forward with evidence to show why they had not complied with the injunction there involved. 38 Cal.2d at 538-539, 241 P.2d 258.

In *Warner v. Superior Court,* 126 Cal.App.2d 821, 824, 273 P.2d 89 (1954), the Court of Appeal took *Mery* one step further and held that *all* affidavits charging contempt of support orders were required to allege ability to pay in order to establish jurisdiction. (See the explication of *Warner* in Pet.Br. at 21-23.) As the legislative history of C.C.P., § 1209.5 conclusively shows, however, the California Legislature responded to *Warner* by enacting § 1209.5, which applies the general rule of *McCarty* to all contempt matters for failure to pay *child* support. By enacting § 1209.5, the Legislature manifested an unmistakable intention to accord *child support* enforcement a "special place in our law," cf. *Rose v. Rose,* 487 U.S. —, 107 S.Ct. —, 95 L.Ed.2d 599, 616 (1987) (O'Connor, J., concurring), more important even than spousal support, where *Mery* still applies.[9] According to the *Review of 1955 Code Legislation,* at p. 129 (Univ. of Cal. Ext. 1955),

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[8] Obviously, the facts of *Mery* are exceptional, and the case has been so interpreted. For example, see *Sorrell v. Superior Court,* 248 Cal.App.2d 157, 160-161, 56 Cal.Rptr. 222 (1967). There, the delinquent father attempted to defend against a 2½ year-old support order under *Mery.* The court found *McCarty* stated the applicable rule of law, holding that the contemner " 'is in the best position to show why for any reason he has not obeyed the order and it is his duty to do so as a matter of defense.' " The *Sorrell* court determined that the 2½ year-old order "fully supported" the trial court's finding of continued ability. Note that here, Respondent was cited for contempt for failure to pay in July 1984 through May of 1985, *a period within one year of the original June 1984 order for support* (J.A. 20; 23). Even if *Mery had* applied, the Judgment of Contempt should have been sustained.

[9] Judge Markey explains that, "[i]n family law proceedings especially, the contempt power is such an important adjunct to the enforcement power that it has come to be almost indispensable. For instance, if the court refuses to use its contempt power to compel obedience to an order to pay support, the order is essentially worthless to the party entitled to support." 4 Markey, *Calif. Family Law: Prac. & Proc., supra,* § 50.52[1], p. 50-141.

"It was stated by the court in *In re McCarty* . . . that the affidavit need not set forth anything more than is required by way of proof. . . . [N]ew § 1209.5 on its face does not require proof of either ability to pay or wilful disobedience with respect to violations of child support orders in order to make out a prima facie case of contempt[. T]he case of *Warner v. Superior Court* is impliedly nullified insofar as it requires allegations of facts showing ability to pay and wilful disobedience."[10]

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[10] To the extent courts are compelled to find that a contemner in a child support enforcement proceeding "wilfully and contemptuously refused to obey" the order of the court (*Oliver v. Superior Court*, 197 Cal.App.2d 237, 240, 17 Cal.Rptr. 474 (1961)), the "intent to violate [the] order may be inferred from the circumstances of noncompliance and failure to seek a modification of the order. *City of Vernon v. Superior Court*, 38 Cal.2d 509, 518, 241 P.2d 243 (1952); *Reliable Enterprises, Inc. v. Superior Court*, 158 Cal.App.3d 604, 612, 204 Cal.Rptr. 786 (1984); *Martin v. Superior Court*, 17 Cal.App.3d 412, 415-416, 95 Cal.Rptr. 110 (1971). *Martin v. Superior Court, supra,* found an alleged contemnor's failure to seek a modification was, using a reasonable doubt standard, sufficient proof of *wilful* failure to comply in 1971; the inference of wilfulness is even stronger today. In 1983, the California Legislature enacted Civ. Code, § 4700.1 (effective July 1, 1984), which provided a "simplified method for the modification of child support awards." Civ. Code, § 4700.1(a). Although Respondent appeared in court three times after the initial June 22, 1984 Support Order was entered (J.A. 34), he never once attempted to utilize the simple procedure to obtain relief from his $150.00 per month obligation, even though he had been advised at the time the original order was made that "the Court has continuing authority to make an order . . . decreasing the amount of child support payments . . . or eliminat[ing them] entirely (J.A. 16). Certainly he cannot now complain that the trial court erred in inferring that he *wilfully* failed to comply with the June 22, 1984, order. Cf. Pen.Code, § 7(1): "The word 'wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

Thus, here, if Respondent did *not* continue to have the same level of ability to pay child support that the court found he had on June 22, 1984, *he* was "in the best position to show," indeed, he was the *only* one who *could* show, his inability, and it was "his duty to do so as a matter of defense."[11] As the California Supreme Court succinctly summarized the matter in *Bailey v. Superior Court*, 215 Cal.548, 555, 11 P.2d 865 (1932):

> "If [his] circumstances have changed so that the order places upon him an intolerable burden, *he is not remediless.* The trial court entering the decree

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[11] Respondent contends in his closing argument that "the trial court erred in finding Phillip Feiock in contempt." Resp.Br. at 26. He suggests that, because he "met his burden of production," the court erred by refusing to accord his testimony weight sufficient to raise a reasonable doubt as to his ability to pay. *Id.* However, it is settled that "[t]he power to weigh the evidence rests with the trial court." *Corenevsky v. Superior Court*, 36 Cal.3d 307, 327, 682 P.2d 360, 204 Cal.Rptr. 165 (1984); *In re Buckley*, 10 Cal.3d 237, 247, 514 P.2d 1201, 110 Cal.Rptr. 121 (1973). The reviewing court "is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction." *City of Vernon v. Superior Court, supra,* 38 Cal.2d at 517, 214 P.2d 243, citing *Bridges v. Superior Court, supra,* 14 Cal.2d 464, 485, 94 P.2d 983.

After Petitioner proved a prima facie contempt beyond a reasonable doubt, Respondent was given an opportunity to purge himself of his apparent contumacy. Respondent actually succeeded in doing so on four of the nine counts charged. As to the remaining five counts, however, Respondent's defense failed. It thus may be said that, as to the five counts of contempt sustained, Respondent's testimony failed to raise *any* reasonable doubt as to Respondent's ability to pay during those five periods.

Respondent next complains that, at the contempt hearing, the trial court did not determine exactly how much Respondent could have paid but found only an ability to pay during the five periods "at least in some regard." Resp.Br. at 5. However, "[t]he court could properly find in the exercise of its discretion that in refusing to make *any contribution whatsoever* [during the months of October, November and December 1984, and March and April 1985 (J.A. 35-36), Respondent] had acted in contempt of the existing order." *Reese v. Reese*, 190 Cal.App. 2d 181, 184, 11 Cal.Rptr. 590 (1961).

still retains jurisdiction to modify its orders if circumstances warrant the change, and the *proper procedure for a party who is unable to comply* with an order for the payment of . . . the support of his minor children *is to seek a modification of the order—not to resist its enforcement, thereby subjecting himself to contempt proceedings.*"[12]

4. REQUIRING THE CITEE TO PRODUCE EVIDENCE OF HIS INABILITY TO COMPLY WITH THE CHILD SUPPORT ORDER AS AN AFFIRMATIVE DEFENSE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT EVEN IF THE CONTEMPT PROCEEDING BELOW IS DEEMED "CRIMINAL."

When the California Legislature of 1955 enacted C.C.P. § 1209.5, it purported to adopt and apply the rule of *In re McCarty, supra,* to proceedings for contempt of court orders to pay child support. *McCarty* had defined ability to pay as an affirmative defense on which the citee has the burden of producing evidence. *McCarty, supra* 154 Cal. at 537, 98 P.540. Manifestly, by codifying the procedure mandated by *McCarty,* the Legislature intended to allocate to the party prosecuting such a contempt the burden of proving beyond a reasonable doubt that the citee knowingly violated a valid court order for child support. To the citee it intended to allocate the burden of going forward with evidence of his affirmative defenses, thereby providing him an *opportunity* "to purge himself" of his apparent contumacy, as in *McCarty. Id.*

Respondent concedes that the constitutionality of such a procedure in a criminal case "is convincing . . . where the [defendant's] burden arises in the context of an affirmative defense," as in *Martin v. Ohio,* 480 U.S. —, 108 S.Ct. 1098, 94 L.Ed.2d 267 (1987). Resp.Br. at 22. As the legislative history examined above shows, Respondent's burden herein arises in just such a context. Thus, as in *Martin,* Petitioner proved everything Petitioner was required to prove. Petitioner thereby "made out a prima facie case [which] survive[d] a motion [for nonsuit. The trier of fact] nevertheless [could] not convict if the evidence offered by the defendant raise[d] any reasonable doubt about the existence of any fact necessary for the finding of guilt." *Id.,* 480 U.S. —, 94 L.Ed.2d at 274-275.

It seems apparent that, *were* this a prosecution for a crime, *Martin v. Ohio* would control.[13] In cases such

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[12] Respondent argues that "Petitioner's failure to obtain review [of *In re Feiock*] in the California Supreme Court" somehow altered settled law that defines "ability to comply" as a defense. Resp.Br. at 14-15; 17. He also insists that this Court must accord "full faith and credit" to the Court of Appeal's opinion below, an opinion which is not yet final because this court granted review. Resp.Br. at 17; 20. Respondent thus obviously misunderstands the effect of the Order of this Court granting certiorari and of the Order entered by Justice O'Connor herein (in No. A-288) on October 23, 1986, staying "execution and enforcement of the judgment of the Court of Appeal" *and* recalling the remittitur. He further ignores footnote 6 in Petitioner's Pet. for Cert. (at 13): denial of review by the California Supreme Court "is *not* an expression of the Supreme Court on the merits of the cause." California Rules of Court, rule 28, Advisory Committee Comment.

[13] As Petitioner has shown, the contempt proceeding here before the court is *civil* in its purpose; it is *not* a criminal case. Had Petitioner desired to prosecute Respondent criminally, a misdemeanor charge under Cal.Pen. Code, § 270 could have been filed. The § 270 criminal statute contains a provision virtually identical to the one in C.C.P. § 1209.5, which permits the prosecution to prove wilful failure to support simply by establishing the defendant's omission to provide. Proof beyond a reasonable doubt that defendant omitted to provide establishes "*prima facie* evidence that such . . . omission . . . is wilful and without excuse." Our state Supreme Court has unequivocally held, "This provision does not set forth a rule relating to proof but merely declares a rule of procedure that places upon the defendant the duty of going forward with evidence that his omission to provide was not wilful or was excusable." (Emphasis added.) *People v. Sorenson,* 68 Cal.2d 280, 286, 437 P.2d

(Continued on following page)

as *Ulster County Court v. Allen*, 442 U.S. 140 (1979) and *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court was justifiably concerned about whether *jurors* could reasonably have interpreted the trial court's instruction as relieving the state of its burden of proof. No such concern is justified here. Obviously, a contempt proceeding for failure of a parent to pay court-ordered child support, a continuing offense, prosecuted under C.C.P., §§ 1209, et seq., differs significantly from a criminal jury trial. The most significant difference, of course, is that, in the former, there is no jury. A judge is trained in the law, and it must be presumed that he will hold the prosecution to its required burden. (Resp.Br. at 46.)[14]

However, *were Ulster* and *Sandstrom* to be relevant, the mandatory presumption of § 1209.5 *should be analyzed as a permissive inference. Ulster, supra,* 442 U.S. 157,

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(Continued from previous page)

495, 66 Cal.Rptr. 7 (1968). It follows a *fortiori* that if the § 270 criminal statute does not affect the burden of proof but only allocates to defendant a burden of producing evidence, the § 1209.5 statute here at issue does no more.

[14] The trial judge below interpreted C.C.P., § 1209.5 as simply "shifting the burden . . . to the defendant to go forward" (J.A. 27). However, even if § 1209.5 shifted the burden of proof on defensive matters to Respondent, there would still be no constitutional infirmity in the statute. Cf. Br. for the United States, at 15-16. See also *People v. Beverly Bail Bonds*, 134 Cal.App3d 906, 911, 913, 185 Cal.Rptr. 36 (1982).

The Solicitor General observes that, "[i]n the vast majority of states, . . . the burden of *persuasion* shifts to the defendant" to prove his inability to pay a support order. (Emphasis added.) Br. for the United States, at 17. (Cf. Pet. for Cert. at 10-11, fn.5.) As the majority of this Court recently recognized in *Rivera v. Minnich*, No. 86-98 (June 25, 1987), "A legislative judgment that is not only consistent with the 'dominant opinion' throughout the country but is also in accord with the 'traditions of our people and our law,' see *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment."

fn. 16. The nature and quality of the evidence produced by Respondent at the contempt hearing below which resulted in the dismissal of four of the counts of contempt charged against him illustrates how minimal the burden of production on the alleged contemner actually is (J.A. 28-35).

CONCLUSION

Respondent suggests disdainfully that if civil contempt is a "petty offense," it is not the necessary and productive enforcement tool Petitioner claims. Resp.Br. at 25, fn. 16. Of course, Respondent fails to note that, as against a parent who conceals his income and flaunts his obligation to care for his own children, contempt is the *only* civil enforcement remedy available. Perhaps it is because respondent has never had to face the *real* threat of incarceration in this case that he presently fails to appreciate how motivating the prospect of even a short stay in jail can be. As Amicus Women's Legal Defense Fund, et al., observes, often, the mere prospect of time in custody, no matter how short, causes a sudden mood of diligence to overcome delinquent parents, resulting in the payment of child support. Br. of Amicus at 23, fn.20.

Thus, it is essential that the civil contempt remedy provided by the California Legislature in 1955 be found constitutional. If C.C.P., § 1209.5 is not upheld, Respondent, and thousands like him, will become the ultimate judges of the validity of the courts' child support orders and, by their simple disobedience, set those orders aside. Then are courts impotent. Then are children of parents such as Respondent without hope of their parents' support.

For the foregoing reasons and those set forth in Petitioner's brief filed upon the granting of Certiorari, Peti-

tioner respectfully asks this Court to reverse the Court of Appeal and to reinstate the Judgment of Contempt.

Respectfully submitted, this 24th day of November, 1987.

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AMICUS CURIAE

BRIEF

No. 86-787

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1986

CECIL HICKS, DISTRICT ATTORNEY FOR
THE COUNTY OF ORANGE, CALIFORNIA,
ON BEHALF OF ALTA SUE FEIOCK,

Petitioner,

v.

PHILLIP WILLIAM FEIOCK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF APPEAL OF CALIFORNIA FOURTH
APPELLATE DISTRICT, DIVISION THREE

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the custodial parent in a civil contempt proceeding to enforce a child support order may constitutionally establish a prima facie case of contempt by proving the existence of a valid child support order, the obligated parent's knowledge of that order and the failure of the obligated parent to pay the court ordered child support, thus requiring the obligated parent to present evidence as an affirmative defense of his or her inability to comply with the order for child support?

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Petitioner,

PHILLIP WILLIAM FEIOCK,

Respondent.

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The issue of child support is an important public concern. The money collected from obligated

parents either through state or county agencies such as the district attorneys, or by the custodial parent acting without state intervention through private counsel or in propria persona, constitutes a direct benefit to children, to families and to the taxpayers. It offers relief to the taxpayers by helping families and preventing their having to seek or to receive public assistance. It reimburses the taxpayer for that public assistance which must be paid to custodial parents on behalf of children. It assists children financially and socially through fostering a sense

of parental responsibility, heritage and self-esteem. It also furthers respect for the law and for judicial decrees and orders and fosters increased community support for the judiciary. (U.S. Dept. of Health and Human Services, Office of Child Support Enforcement, National Institute for Child Support Enforcement, National Council of Juvenile and Family Court Judges, A Guide for Judges in Child Support Enforcement, pp. 8-9 (1983 Reprint).)

A startling picture was painted in 1983 by the United States Bureau of Census. "Of 8.4 million female-headed households in 1982, only about 1 million, or 12%, got as

much as $200 per month in child support over the full year. Another 1.9 million got an average of $25 per week. The remaining 5.5 million, received absolutely nothing." (Dixon, Child Support Enforcement: Unequal Protection Under the Law, page v, (National Forum Foundation 1985).)

Under 42 United States Code section 654, the states are required to have in effect a state plan for child and spousal support. The implementing regulations found at 45 Code of Federal Regulations, Chapter III, require in part that the states attempt to collect support through instituting, as applicable and necessary,

"[c]ontempt proceedings to enforce an extant court order. . . ." (45 C.F.R. § 303.6 (1982).) The purpose of civil contempt proceedings in child support cases is to coerce otherwise unwilling parents to support their children. (Cf., Maggio v. Zeitz, 333 U.S. 56, 67, 92 L.Ed. 476, 486, 68 S.Ct. 401, 407 (1948).)

The California state plan requires that the district attorney of each county enforce child support obligations within his or her county. (Cal. Welf. & Inst. Code, § 11475.1.) As the chief law officer in the state, the Attorney General of the State of California has supervisory authority over the

district attorneys. (Cal. Const., art. V, § 13.)

Statistics show that civil contempt is an important remedy to enforce compliance with child support orders in California. During the first six months of 1986 over 2,400 separate civil contempt proceedings were instituted by California district attorneys in California courts.

This case presents a significant issue relating to the handling of civil contempt proceedings in our nation's courts to enforce child support obligations. Almost all the states clearly place the burden on the citee in contempt proceedings for

child support at least to raise the issue and to present evidence as an affirmative defense that he or she was financially unable to comply with the court's order for child support. Under the holding of the California Court of Appeal in this case parents entitled to receive support for the children would have the difficult burden of establishing not only that a lawful order for child support was entered, that the citee had knowledge of the order and that the citee did not comply with the order, but also that the citee had the financial ability to comply with the order. While the burden might not be quite so difficult where the obligated parent is

employed by a third party and payroll records can be subpoenaed, the burden becomes very difficult if not impossible where the obligated parent is self-employed or works on a cash basis. Moreover, in cases where salary records could be located, they would have to be subpoenaed in every single case.

SUMMARY OF ARGUMENT

Financial inability to comply with a court order to pay child support is recognized as an affirmative defense in a civil contempt proceeding in virtually all jurisdictions within the United States. At the very least the obligated parent, who is the one who knows his or her own financial situation, has the burden of raising the defense and presenting evidence. The constitutionality of this procedure has been expressly upheld by the Iowa Supreme Court in Skinner v. Ruigh, 351 N.W.2d 182 (Iowa Sup.Ct. 1984), and by the California Court of Appeal in Martin v. Superior Court, 17 Cal.App.3d 412,

95 Cal.Rptr. 110 (1971), and the reasoning of these cases is persuasive.

If the judgment of the California Court of Appeal in Mr. Feiock's case is not reversed, it will be virtually impossible to obtain child support from self-employed parents obligated to pay child support, to the detriment of thousands of children.

ARGUMENT

CALIFORNIA MAY CONSTITUTIONALLY REQUIRE CITEES IN CIVIL CONTEMPT PROCEEDINGS TO ENFORCE CHILD SUPPORT TO PRESENT EVIDENCE OF INABILITY TO PAY AS AN AFFIRMATIVE DEFENSE

In the United States Department of Health and Human Services' publication, A Guide for Judges in Child Support Enforcement (1983 Reprint) at page 99 et seq., potential defenses in child support cases are discussed.[1/]

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1. It should be noted that all defenses are not necessary available in all states. For example, California Civil Code section 4382 and California Code of Civil Procedure section 1694 provide that denial of visitation or custody is not a defense to failure to pay support, evidently under the theory that each is an independent court regulated right and obligation and the parties should not be encouraged to resort to self-help.

"There are a number of defenses invoked by defendants in child support cases. These defenses include the inability to pay; bankruptcy; no support ordered by the court; visitation; adoption; release agreements; statutes of limitations or laches; children who have moved or ran away without parental consent; or children who are of independent means or cared for by a third party; jurisdiction; constitutional matters;

and denial of the right to court appointed counsel for indigent defendants in paternity cases. The discussion of each of these defenses reflects the current court decisions.

"THE INABILITY TO PAY SUPPORT

"The inability to pay child support is a defense which is based on the obligor's not having enough money to meet living expenses and to pay child support too. The possible reasons for inability to pay include

illness, unemployment, the costs of supporting a new family, or some other seemingly justifiable reason. Whatever the reason, the inability to pay support is a defense only against incarceration. A delinquent parent can be jailed for two reasons: criminal nonsupport and contempt actions.

"After the State presents its case, the burden rests on the defaulting parent to present evidence showing an inability to comply with the child

supporting case is Application of Martin, 279 P.2d 873 (Idaho 1955): The incurring of debts is not the fault of (the mother) nor did she derive any benefit therefrom, and does not relieve the (father) of his duty to support the child. It is the duty of the (father) to support his wife and child, and if he now finds himself involved in entanglements, the net was knotted by his own voluntary act. [See Hampshire v. Hampshire, 223 P.2d 950 (Idaho

223 P.2d 950 (Idaho 1950)]." (HHS, A Guide for Judges in Child Enforcement, supra, at p. 99, footnote omitted.)

As with other affirmative defenses, the rationale of California Code of Civil Procedure section 1209.5 for placing the burden of presenting evidence upon the parent obligated to pay support in civil contempt proceedings to enforce child support is that this knowledge is solely within the knowledge of the obligated parent. (See Martin v. Superior Court, 17 Cal.App.3d 412, 95 Cal.Rptr. 110 (1971).)

The defense of inability to pay child support or alimony in terms of who has the burden to present evidence is discussed in the Annotation, "Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony or child support," 53 A.L.R.2d 591 (1957). (See also the earlier annotations at 22 A.L.R. 1260 (1923), 31 A.L.R. 650 (1924), 40 A.L.R. 547 (1926), 76 A.L.R. 392 (1932), and 120 A.L.R. 705 (1939).) The Annotation at 53 A.L.R.2d, section 9 at pages 606-616, and the A.L.R.2d Later Case Service updating the annotation set out reported cases from 41 states and the District of Columbia,

including California, for the proposition that the citee has the burden of at least presenting evidence in civil contempt proceedings of inability to pay. Of the states not listed in the Annotation, Arizona (Dyer v. Dyer, 92 Ariz. 49, 373 P.2d 360, 362 (1962)), Massachusetts (Salvesen v. Salvesen, 370 Mass 608, 351 N.E.2d 499, 501 (1976)) and Wyoming (Ferguson v. Ferguson, 481 P.2d 658 (Wyo.Sup.Ct. 1971)) have also recognized this standard. The law in the remaining six states (Colorado, Delaware, Hawaii, Maryland, Nebraska, and New Hampshire) is unclear. However, none of the states in the Union

except for California in the California Court of Appeal opinion in this case, In re Feiock, 180 Cal.App.3d 649, 225 Cal.Rptr. 748 (1986), has clearly taken the opposing position. An intermediate appellate court opinion from Texas could be interpreted as supporting the California Court of Appeal opinion in Feiock.[2/] This question

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2. In Ex Parte Lopez, 710 S.W.2d 948, 956 (Tex Ct.App. 1986), the majority noted that no evidence had been presented to the obligated parent's ability to comply ". . . other than the fact that he did not comply. At the very least, where defendant produces some evidence of inability to pay, he should not be imprisoned unless there is evidence sufficient to support, beyond a reasonable doubt, the finding of ability to comply." (Emphasis supplied.)

On the other hand, as noted by the dissent at page 957:

"Our Supreme Court has held that the inability to comply with a child support order is a good defense, but that the burden of proof is on the respondent. Ex Parte Padfield, 154 Tex. 253, 276 S.W.2d 247, 251 (1955); Ex parte Hollenborn, 154 Tex. 223, 276 S.W.2d 251, 253-54 1955. The Padfield and Hollenborn cases have been routinely followed in this state for thirty years. The latest court of appeals case to place the burden of proof on the respondent is Ex parte Burroughs, 687 S.W.2d 444 Tex.App.--Houston [14th Dist.] 1985, no writ). The majority has shown no compelling reason to overrule these cases.

"The majority's opinion, if upheld, will force the movant in a child support enforcement action to produce evidence on the nonmovant's financial status, an onerous burden

of the constitutional propriety of requiring the parent obligated to pay support to raise the issue of and to present evidence of his or her inability to pay child support in contempt proceedings was considered by the Iowa Supreme Court in the cases of Lamb v. Eads, 346 N.W.2d 830 (Iowa Sup.Ct. 1984), and in Skinner v. Ruigh, 351 N.W.2d 182 (Iowa Sup.Ct. 1984). In Lamb the parent obligated to pay child support argued that contempt based

and not in the best interest of the child."

The earlier Texas authority cited in the dissent placed the burden of proof on the obligated parent, not as in California, the burden of raising the defense and producing evidence. (See Cal.Code Civ.Proc., § 1209.5.)

on failure to pay child support required that the failure be willful. The parent argued that the trial court erred in placing the burden on him regarding the issue of willfulness and in finding willfulness in the absence of substantial evidence. Relying on cases from Iowa, Minnesota, North Dakota, and Wisconsin, the Iowa Supreme Court held that an applicant for a contempt citation in child support and spousal support cases establishes a prima facie case by proving the duty which is on the contemner and the contemner's failure to perform the duty, and that the contemner then has the burden of showing that he or she was

unable to perform the duty if the contemner relies upon that ground. (Lamb v. Eads, supra, at p. 832.)

In Skinner v. Ruigh, supra, 351 N.W.2d 182, the Iowa Supreme Court extended Lamb and considered the contemner's burden in child support cases in light of the Fourteenth Amendment. Because the case and its reasoning is so clearly in point, amicus will quote it at length:

> ". . . The contemner's burden is a burden of production on the defense of inability to perform the duty rather than a burden of persuasion. (See Harkins, 256 Iowa at

211, N.W.2d at 89-90.)
The burden of persuasion on the willfulness issue does not shift from the contemnee. Moreover, even if the contemnee makes a prima facie case and the contemner introduces no evidence, the court must still weigh the contemnee's evidence to determine whether the elements of the offense have been established by the requisite proof.

"The same allocation of burden of proof was involved in United States v. Rylander, 460 U.S. 752,

103 S.Ct. 1548, 75 L.Ed.2d 521 (1983), relied on by this court in Lamb. It makes no difference that the contempt proceeding in Rylander was characterized as civil rather than criminal. Due process does not preclude placing the burden of production on an accused person on a defensive issue in a criminal case.

"The present situation is analogous to the burden of proof allocation when diminished responsibility is urged as a defense to a specific intent crime.

The State retains its burden of persuasion and initial burden of production on the issue of specific intent. The accused has the burden to produce evidence on the defense, and when such evidence is introduced it must be considered by the jury in determining whether the State met its burden to prove specific intent. See State v. Rinehart, 283 N.W.2d 319, 320 (Iowa 1979), cert. denied, 444 U.S. 1088, 100 S.Ct. 1049, 62 L.Ed.2d 775 (1980). Similarly the

contemnee has the burden of persuasion and initial burden of production on the willfulness element of a contempt charge. When inability to pay is urged as a defense, the alleged contemner has the burden to produce evidence on that issue. The court then considers all of the evidence in determining whether the contemnee has proved willfulness.

"This allocation of the burden to produce evidence is within the constitutional limits fixed for criminal cases

in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). We find no merit in Jerry's due process attack on the allocation of burden of proof on the willfulness element." (Skinner v. Ruigh, supra, at p. 185; see also Martin v. Superior Court, supra, 17 Cal.App.3d 412, 416-418, 95 Cal.Rptr. 110, 112-113, in which the constitutionality of the California procedure under

California Code of Civil Procedure section 1209.5 against a Fifth Amendment challenge was also upheld.)

In United States v. Rylander, 460 U.S. 752, 757, 760-761, 75 L.Ed.2d 521, 528, 530, 103 S.Ct. 1548, 1552, 1554 (1983), the Court explicitly held that in a contempt proceeding the defendant may assert a present inability to comply with a previous court order for production of documents relating to federal taxes, but in raising the defense in a contempt proceeding the defendant has the burden of production of evidence as to inability. This is the same

standard previously recognized in California in child support cases in which the obligated parent has been required to raise as an affirmative defense in civil contempt proceedings that he or she had complied with the order to the best of his or her ability. (Lyons v. Municipal Court, 75 Cal.App.3d 829, 838, 142 Cal.Rptr. 449, 452 (1977); Oliver v. Superior Court, 197 Cal.App.2d 237, 242, 17 Cal.Rptr. 474, 476-477 (1961); see Lyon v. Superior Court, 68 Cal.2d 446, 451, 439 P.2d 1, 4, 67 Cal.Rptr. 265, 268 (1968).)

Indeed in initially requesting child support, the parent having custody of the child has the

burden of proving that the amount of child support is proper. Thus, at the time of a subsequent contempt hearing, the court has already litigated the question of the obligated parent's ability to pay and the propriety of the amount of the order. If the situation changes the noncustodial parent who is obligated to pay support can later seek a downward modification of support but in such a modification proceeding the obligated parent has the burden of proving a change of circumstances, for example, a reduction in his or her income making him or her unable to pay the previously ordered periodic payments. (See Cal.Evid.Code, §

500; Markey, 4 Cal.Family Law, Practice and Procedure § 51.24[3] (1987).) If the California Court of Appeal opinion in Feiock stands, parents obligated to pay support will not have the incentive to seek modifications. Instead the obligated parents could openly flout court orders and at subsequent civil contempt proceedings watch the parent entitled to receive support attempt to offer evidence of the obligated parent's ability to pay known but to the obligated parent.

Clearly the California Court of Appeal was incorrect in deciding Feiock as it did. This Honorable Court should reject the position taken by the California

Court of Appeal in Feiock. Otherwise the only enforcement tool to obtain support for children of self-employed parents will be unnecessarily vitiated. (Cf., United States v. Rylander, supra, 460 U.S. 752, 762, 75 L.Ed.2d 521, 531, 103 S.Ct. 1548, 1555.)

The California Department of Social Services, Health and Welfare Agency, publishes statistical reports for the Child Support Management Information System. The most recent quarterly report for January through March, 1986, shows that during that three month period the district attorneys in California filed a total of 1,681 contempt actions. Of these cases,

689 were filed in cases where the custodial parent was not receiving AFDC (Aid to Families with Dependent Children) on behalf of the child, and 913 contempt actions were filed where the custodial parent was receiving AFDC. The remaining 79 contempt actions were filed in cases forwarded from other states where the public assistance status of the custodial parent living in the other state is not known. (California Department of Social Services, Child Support Management Information System Quarterly Report, January-March 1986, Table 7.)[3/] These

3. Unpublished figures for the April-June 1986 quarter reflect that a total of 1,757 contempt proceedings were filed in California by district attorneys during this

figures do not include contempt proceedings filed by parents who are represented by private counsel or who are representing themselves in propria persona. If the California Court of Appeal position is upheld, the children involved in these and subsequent cases may forever be denied the support to which they are entitled.

period. In 700 of these cases the families were not receiving AFDC. In the remaining cases the families were receiving AFDC. Beginning in April 1986 California county district attorneys no longer reported "responding" cases as a separate category; as of that date responding cases were included in either the AFDC or non-AFDC figures.

CONCLUSION

For the foregoing reasons it is requested that the Court hold constitutional California Code of Civil Procedure section 1209.5, which places the burden on the citee in child support cases to raise as an affirmative defense his or her inability to pay court ordered child support and to present evidence on

that issue, and that the judgment of the Court of Appeal of the State of California be reversed.

Respectfully submitted,

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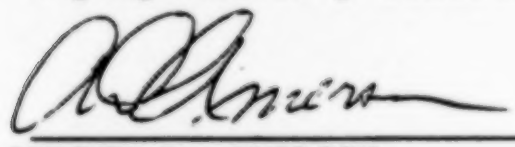

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AMICUS CURIAE

BRIEF

No. 86-787

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CECIL HICKS, DISTRICT ATTORNEY
FOR THE COUNTY OF ORANGE, CALIFORNIA,
ON BEHALF OF ALTA SUE FEIOCK,
Petitioner,

v.

PHILLIP WILLIAM FEIOCK,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, PARENTS WITHOUT PARTNERS, INC., AND THE NOW LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-787

CECIL HICKS, DISTRICT ATTORNEY
FOR THE COUNTY OF ORANGE, CALIFORNIA,
ON BEHALF OF ALTA SUE FEIOCK,
Petitioner,

v.

PHILLIP WILLIAM FEIOCK,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

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MOTION OF THE WOMEN'S LEGAL DEFENSE FUND, PARENTS WITHOUT PARTNERS, INC., AND THE NOW LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3 of the Rules of this Court, the Women's Legal Defense Fund, Parents Without Partners, Inc., and the NOW Legal Defense and Education Fund hereby respectfully move for permission to file the attached brief *amicus curiae* in this case. Counsel for the petitioner has given oral consent to the filing of this brief, but has not yet provided written confirmation. Consent of counsel for the respondent was requested but refused.

This case involves the question whether the California legislature's requirement that the noncustodial parent in a child support enforcement proceeding produce evidence of his inability to comply with a prior court order is consistent with federal due process requirements. *Amici* have an interest in communicating to the Court their views that the California procedure is consistent with due process and that the contrary holding of the court below seriously threatens the effectiveness of child support enforcement.

The decision of this Court in the present case will have a significant impact on each of the *amici* organizations and their members. The Women's Legal Defense Fund, Parents Without Partners, Inc., and the NOW Legal Defense and Education Fund are each non-profit organizations with commitments to issues involving child support enforcement. As described in the attached brief, *amici* have had extensive involvement in state and federal litigation and legislative proceedings concerning child support awards and enforcement.

While *amici* do not question the parties' ability to present their concerns, they believe their brief will be of significant assistance to the Court. *Amici* will explain that child support enforcement proceedings are civil in nature and that the court below therefore erred in applying a constitutional standard developed for evidentiary presumptions in criminal cases. In addition, *amici* will demonstrate that this Court has long found it appropriate to require a citee in a civil contempt proceeding to produce evidence of his inability to comply with a court order. Finally, *amici* will show that the balance of interests in this case confirms the conclusion that the California procedure is consistent with due process. In view of their extensive work on child support enforcement issues, *amici* are particularly well qualified to inform the Court concerning the dimensions of the child support problem and the interests at stake in child support enforcement proceedings.

For the foregoing reasons, the motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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May 14, 1987

May 14, 1987

QUESTION PRESENTED

Whether the California legislature's requirement that the noncustodial parent in a child support enforcement proceeding produce evidence of his inability to comply with a prior court order is consistent with federal due process requirements.

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BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, PARENTS WITHOUT PARTNERS, INC., AND THE NOW LEGAL DEFENSE AND EDUCATION FUND AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

The Women's Legal Defense Fund (WLDF), a nonprofit membership organization based in Washington, D.C., was founded in 1971 to assist women in their effort to gain equality under the law. In response to numerous requests for assistance in matters relating to child support, WLDF has instituted the National Child Support Project. Through this and other programs, WLDF provides technical assistance to attorneys, engages in nationwide fact-gathering, analyzes current and pro-

posed legislation, and provides representation at the appellate level. In addition, WLDF worked closely with congressional staff on the passage of the Child Support Enforcement Amendments of 1984, and submitted comments on the implementing regulations proposed by the Department of Health and Human Services. In September 1986, WLDF sponsored a three-day conference on child support guidelines as part of WLDF's ongoing involvement in guideline development throughout the nation. WLDF has filed *amicus curiae* briefs in numerous cases before this Court, including *Rose* v. *Rose*, No. 85-1206.

Parents Without Partners, Inc. (PWP) is an international non-profit organization of 180,000 single parents nationwide and in Canada and Switzerland. It is the nation's largest and oldest mutual support organization for single parents, devoted to the welfare and interests of single parents and their children. PWP has worked for improved child support enforcement for a number of years, promoting better legislation, helping form a network of grassroots organizations, and providing a free hotline counseling service directly to parents.

The NOW Legal Defense and Education Fund (NOW LDEF) is a not-for-profit civil rights organization that performs a broad range of legal and education services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women, a membership organization of over 170,000 women and men in more than 725 chapters throughout the country. Family law, and in particular the economic rights of women in the family sphere, are a major focus of NOW LDEF's work. The organization has filed *amicus curiae* briefs on family law issues in numerous cases in state and federal courts. Cases in which NOW LDEF has filed *amicus curiae* briefs before this Court include *Rose* v. *Rose*, No. 85-1206.

As a result of their involvement in state and federal litigation and legislative proceedings concerning child support awards and enforcement, *amici* are particularly well qualified to inform the Court of the dimensions of the child support problem.

STATEMENT

1. On January 19, 1976, the Superior Court of California for Orange County entered an interlocutory judgment declaring that Alta Sue Feiock and respondent Phillip William Feiock were entitled to have their marriage dissolved. As part of that judgment the court awarded custody of the couple's three children to Alta Feiock and ordered respondent to make payments for the support of the children in the amount of $225 per month. J.A. 7-8.

Alta Feiock and the three children subsequently moved to the State of Ohio. When, after a period of time, respondent failed to make any of the child support payments required by the court's order, Alta Feiock sought the assistance of the Ohio prosecuting agency in enforcing her child support order. Pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), the Ohio agency transmitted Alta Feiock's petition to the Clerk of the Court of Orange County, California. The petition was filed in the Orange County Superior Court on March 24, 1983. J.A. 3-6. At a URESA hearing held on June 22, 1984, respondent testified concerning his expected income from a partnership in which he was then involved. On the basis of that testimony, the court entered an order requiring respondent to make child support payments to the Orange County District Attorney in the amount of $150 per month on a temporary basis. J.A. 15-17.

2. Between June 22, 1984, and July 31, 1985, respondent made only two child support payments. Acting

pursuant to sections 9 and 12(a) of URESA, enacted as California Civil Procedure Code §§ 1672[1] and 1680(a),[2] the Orange County District Attorney initiated contempt proceedings against respondent. On March 5, 1985, the District Attorney filed in the Orange County Superior Court a Declaration of Contempt and Order to Show Cause, citing respondent for six counts of contempt, corresponding to six monthly support payments respondent had failed to make during the period July 1984 through February 1985. On June 12, 1985, the District Attorney filed a second Declaration of Contempt and Order to Show Cause, adding three counts corresponding to missed payments for the period March through May, 1985. J.A. 21-23.

On August 9, 1985, the Orange County Superior Court held a hearing to determine whether respondent should be held in contempt of court.[3] At the hearing, the district attorney proved the existence of a valid court order directing respondent to pay child support, respondent's knowledge of the order, and his failure to comply with the order. Relying on California Civil Procedure Code

[1] Cal. Civ. Proc. Code § 1672 provides in pertinent part:

> All duties of support, including the duty to pay arrearages, are enforceable by an action under this title, including a proceeding for civil contempt.

[2] Cal. Civ. Proc. Code § 1680(a) provides:

> After the responding court receives copies of the complaint, certificate and act from the initiating court the clerk of the court shall docket the case and notify the prosecuting attorney of his action. Claims received by this state from an initiating agency shall be forwarded to the district attorney for preparation and filing of appropriate pleadings.

[3] Cal. Civ. Proc. Code § 1209(a) provides in relevant part:

> The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:
>
> . . . .
>
> 5. Disobedience of any lawful judgment, order, or process of the court.

section 1209.5,[4] the district attorney rested. J.A. 24-26. Respondent then moved for a nonsuit, arguing that the district attorney could not rely on section 1209.5 to satisfy his burden on the issue of respondent's ability to comply with the support order, because, in respondent's view, the presumption established by that section unconstitutionally shifted the burden to respondent as to that element of contempt. J.A. 26. The court denied respondent's motion. J.A. 27.

Respondent then took the stand and testified that his partnership had been dissolved, that he had started his own business, which had worked out "not very well," that he had received income and had broken even or earned a profit during some months but had ultimately liquidated the business, that he had made payments to a number of his creditors during the period at issue, and that after liquidation of his business he had taken a sales job and was earning several hundred dollars per week by the time of the hearing. J.A. 27-34, 37. Respondent presented income and expense sheets from his business for three of the months, but was otherwise unable to provide documentation of his financial situation. J.A. 29, 34. The court concluded on the basis of respondent's evidence that he had had the ability to make at least a portion of the court-ordered payments during the months of October, November, and December of 1984 and March and April of 1985, and that he had willfully disobeyed the court order during those five months. The court dis-

[4] Cal. Civ. Proc. Code § 1209.5 provides:

> When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his child, proof that such order was made, filed and served on the parent or proof that the parent was present in court at the time the order was pronounced and proof of noncompliance therewith shall be prima facie evidence of a contempt of court.

missed the remaining counts of contempt on the ground that respondent had lacked the ability to pay during those periods. J.A. 35.

Respondent was sentenced to five days' imprisonment on each of the five counts, to be served consecutively, for a total of 25 days. J.A. 36. However, the court suspended the sentence and placed respondent on three years' informal probation, on condition that he make monthly payments of $150 as they accrued, plus $50 per month in payment of the arrearage. J.A. 36-37, 40. The court warned respondent not to let his payments slide because "we've got 25 days hanging over your head," but counseled respondent to contact the court if he encountered difficulties. J.A. 36-38.

3. Respondent filed a petition for a writ of habeas corpus in the California Court of Appeal, Fourth Appellate District. The Court of Appeal annulled the judgment of contempt. Pet. App. A1-A11. The court concluded that section 1209.5 established a rebuttable, but mandatory, presumption as to the noncustodial parent's ability to pay, which it characterized as "an essential element of the case." The court described contempt as "quasi-criminal" and stated that presuming contempt on a showing of noncompliance with a court order lessened the prosecution's burden of proof. According to the court, federal due process principles required the invalidation of section 1209.5 if the facts to be proved—a valid court order, knowledge of the order, and the parent's noncompliance—did not compel an inference of the presumed fact—ability to pay—beyond a reasonable doubt. Pet. App. A8. Examining the presumption on its face, the court held that it failed to meet that test. The court recognized that the inference of ability to pay is compelling "for some period of time following the court's order and initial determination of ability to pay," but

concluded that such an inference "weakens with the passage of time." Pet. App. A9.[5]

The Court of Appeal found it irrelevant that a parent can petition for modification of the support order whenever his financial condition changes. According to the court, respondent was not required to seek modification, but was entitled to "sit on his hands" and defend against any contempt charge by relying on the prosecution's burden of showing affirmatively, beyond a reasonable doubt, his ability to pay. Pet. App. A9. The court held that, in the future, section 1209.5 should be construed as establishing only a permissive inference of ability to comply with a child support order. Pet. App. A10-A11.

SUMMARY OF ARGUMENT

1. There is no constitutional barrier to the California legislature's decision to require a noncustodial parent to produce evidence of his inability to make court-ordered child support payments. Child support enforcement proceedings are civil in nature, not criminal. Their purpose—to force the noncustodial parent to comply with an existing court order—is remedial. Thus, the court below erred in invalidating Cal. Civ. Proc. Code § 1209.5 on the authority of this Court's decisions concerning mandatory presumptions in criminal cases. In civil cases due process requires only that a rebuttable presumption be reasonable—a standard that is clearly met in this case.

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[5] In holding that the mandatory presumption created by section 1209.5 was constitutionally objectionable, the court below relied on a state court case, People v. Roder, 33 Cal. 3d 491, 189 Cal. Rptr. 501, 658 P.2d 1302 (1983). *Roder* in turn relied on decisions of this Court involving federal constitutional requirements in criminal cases, primarily Ulster County Court v. Allen, 442 U.S. 140 (1979), and Sandstrom v. Montana, 442 U.S. 510 (1979).

2. It is significant that this Court has long regarded it as appropriate to place on the citee the burden of producing evidence of inability to comply in order to avoid an adjudication of civil contempt. In *United States* v. *Rylander*, 460 U.S. 752 (1983), the Court held that a citee must bear that burden even when he invokes his Fifth Amendment privilege against self-incrimination. *A fortiori* requiring respondent to produce evidence of his inability to pay should be unobjectionable.

3. Even if the Court were to engage in a *de novo* consideration of due process requirements in this case, there could be no constitutional objection to the procedure chosen by the California legislature. The interests of the noncustodial parent in a child support enforcement proceeding are weak. He faces only mild sanctions of a remedial nature; production of evidence of his financial condition is not burdensome; and if unable to pay he can avoid contempt proceedings altogether by seeking timely modification of the support order. On the other hand, the interests of the custodial parent and her children are strong. Nonreceipt of child support payments may cause great financial hardship for them. It may be impossible for the custodial parent to obtain evidence of the noncustodial parent's ability to pay, particularly when the latter is self-employed or conceals his assets.

There is a strong societal interest at stake in child support enforcement. The State has a general interest in effective enforcement of court orders, which will be frustrated if a noncustodial parent may evade a valid order simply by refusing to produce evidence of his financial circumstances. Moreover, both states and the federal government have a strong interest in effective enforcement of child support orders, because support payments are crucial to the well-being of many of their citizens. Balancing of these relevant interests confirms the

conclusion that California's approach to proof in child support enforcement proceedings is consistent with federal due process requirements.

ARGUMENT

REQUIRING THE NONCUSTODIAL PARENT IN A CHILD SUPPORT ENFORCEMENT PROCEEDING TO PRODUCE EVIDENCE OF HIS INABILITY TO COMPLY WITH A PRIOR COURT ORDER IS CONSISTENT WITH FEDERAL DUE PROCESS REQUIREMENTS

This case involves an attempt by respondent's former wife to enforce a judicial order that required respondent to make regular child support payments for the benefit of his three children. On the basis of evidence respondent offered at a hearing the trial court concluded that respondent had had the ability to make payments during five of the months at issue and therefore held him in contempt as to those months. The California Court of Appeal annulled the judgment of contempt, holding that the trial court's reliance on a statutory presumption of respondent's ability to pay was unconstitutional.

The decision below is clearly in error. Because the contempt proceeding in this case was fundamentally civil in nature, there is no due process objection to the California legislature's approach to proof of ability to pay. The California court's holding has serious practical implications for child support enforcement. It permits a noncustodial parent to ignore a valid judicial order with impunity. In particular, noncustodial parents who are self-employed or who conceal their assets will be free to flout court support orders repeatedly simply by avoiding documentation of their income and assets and declining to offer evidence on that subject. Due process surely does not require such a result.

A. Because The Contempt Proceeding In This Case Was Civil In Nature, There Is No Constitutional Objection To The California Legislature's Establishment Of A Rebuttable Presumption Of Ability To Pay

1. The court below analyzed this case on the premise that it involved a criminal proceeding and applied due process standards established by this Court for evidentiary presumptions in criminal cases. However, the proceeding at issue here was fundamentally civil in nature.

This Court has long recognized the fundamental distinction between civil contempt and criminal contempt. Civil contempt proceedings are intended to secure compliance with a judicial decree and are thus remedial in purpose. In contrast, criminal contempt proceedings are intended to punish the contemnor for disregard of the court's authority and to serve as a deterrent to offenses against the public. The court may order that the contemnor be incarcerated in either type of proceeding. However, in civil contempt cases the imprisonment is conditional, for the purpose of compelling the contemnor to comply with an existing judicial order.[6] The court conditions release on the contemnor's willingness to comply with the original order. In contrast, in a criminal contempt proceeding the court imposes an unconditional sentence for punishment or deterrence. See *Shillitani* v. *United States*, 384 U.S. 364, 368-70 (1966); *Penfield Co.* v. *SEC*, 330 U.S. 585, 590 (1947); *Nye* v. *United States*, 313 U.S. 33, 42-43 (1941); *Lamb* v. *Cramer*, 285 U.S. 217, 220-21 (1932); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441-43 (1911).

In addition, a civil contempt proceeding is for the benefit of the other parties to the original action, while a criminal contempt proceeding is for the purpose of

[6] In some cases the court may impose a determinate sentence that includes a purge clause. Shillitani v. United States, 384 U.S. 364, 370 n.6 (1966).

vindicating the court's authority. *Nye* v. *United States*, 313 U.S. at 42-43; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 441. A civil contempt proceeding is even sometimes regarded as part of the original action. See G. Wright, J. Byrne, G. Haakh, P. Westbrook & F. Wheat, *Civil and Criminal Contempt in the Federal Courts*, 17 F.R.D. 167, 171-72.

Contempt proceedings for the purpose of compelling the citee to comply with a child support or alimony order have traditionally been viewed as civil in nature. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 442 (citing commitment of defendant who refuses to pay alimony as an example of civil contempt); O. Fiss, *Injunctions* 763 (1972) ("The paradigm of a civil contempt fine is alimony."). The purpose of a child support enforcement proceeding is not to punish the noncustodial parent but to compel him to make payments in compliance with the court's original support order. A noncustodial parent who is found to be in contempt is imprisoned only as a means of pressuring him to make the payments required by the court's order. If he pays the amount owed under the order, he escapes incarceration. Thus, like all civil contemnors, noncustodial parents who are found to be in contempt because of their failure to make support payments "'carry the keys of their prison in their own pockets.'" *Shillitani* v. *United States*, 384 U.S. at 368 (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)). Moreover, it is clear that a child support enforcement proceeding is conducted at the instance, and for the benefit, of the custodial parent and her children. While the proceeding may have the secondary effect of vindicating the court's authority, its primary effect is to provide relief to the intended beneficiaries of the original court order.

Respondent argues, and the court below concluded, however, that the proceeding in this case must be re-

garded as criminal in nature because of the unusual treatment of contempt in California. They point out that, unlike other jurisdictions, California has not distinguished between civil and criminal contempt for procedural purposes.[7] As a result the California courts have characterized all contempt proceedings, whether civil or criminal, as quasi-criminal in nature and have provided citees with many of the rights afforded to criminal defendants. See, *e.g.*, *Ross* v. *Superior Court*, 19 Cal. 3d 899, 913, 141 Cal. Rptr. 133, 142, 569 P.2d 727 (1977); *Culver City* v. *Superior Court*, 38 Cal.2d 535, 541, 241 P.2d 258, 261-62 (1952). California's statutory scheme is admittedly unusual in blurring the procedural distinctions between civil and criminal contempt. See G. Wright, et al., 17 F.R.D. at 180. Presumably as a result of this procedural approach, the contempt proceeding in this case had several features that at least superficially suggest that it was criminal in nature.[8]

Nevertheless, the proceeding below appears to have been fundamentally civil in nature. The California legislature apparently intended that contempt proceedings

[7] California does distinguish between civil and criminal contempt for substantive purposes. Civil contempt is defined in Cal. Civ. Proc. Code § 1209, while criminal contempt is defined in Cal. Penal Code § 166. However, it appears that the procedures and sanctions set out in Cal. Civ. Proc. Code §§ 1209-1222 apply in both civil and criminal contempt proceedings. Culver City v. Superior Court, 38 Cal. 2d 535, 541, 241 P.2d 258, 261-62 (1952).

[8] The orders to show cause issued to respondent state on their face that "[a] contempt proceeding is criminal in nature" and warn of "possible penalties" if respondent were found to be in contempt. J.A. 18, 21. The orders to show cause alleged that respondent had "willfully disobeyed" court orders (J.A. 19, 22), language that echoes California's criminal contempt statute, Cal. Penal Code § 166. The trial court's order contains similar language. J.A. 39. During the hearing the trial court advised respondent that he had a constitutional right not to testify. J.A. 27.

in child support cases would be civil in nature.[9] While the orders to show cause in this case do not indicate on their face the statutory authority under which they were issued, it is undisputed that the proceedings were held pursuant to the Uniform Reciprocal Enforcement of Support Act. California Civil Procedure Code § 1672, which is part of the California codification of the Act, refers to enforcement of support orders by "a proceeding for civil contempt." Thus, the district attorney presumably was acting under California's civil contempt statute, Cal. Civ. Proc. Code § 1209, in issuing the orders to show cause to respondent.[10] Moreover, the purpose of the Uniform Reciprocal Enforcement of Support Act is to improve the enforcement of duties of support. Cal. Civ. Proc. Code § 1652.[11] Thus, on its face the legislative intent was remedial, not punitive. In addition, the California courts have recognized that a child support enforcement proceeding in that State "is primarily a method of collecting money . . . It is a coercive measure designed to compel obedience to the court's orders rather

[9] In the case of a statutorily defined penalty, this Court has determined whether the penalty is civil or criminal for due process purposes by looking initially at the legislative intent. If the Court concludes that the legislature intended to enact a civil measure, it then inquires whether "the statutory scheme is so punitive either in purpose or effect" that the proceeding must be considered criminal. Allen v. Illinois, 106 S. Ct. 2988, 2992 (1986); United States v. Ward, 448 U.S. 242, 248-49 (1980).

[10] The orders to show cause contain no reference to California's criminal contempt statute, Cal. Penal Code § 166. Had the district attorney intended to proceed under that statute, he presumably would have filed a criminal complaint specifically citing the statute. See, *e.g.*, Metcalf v. Municipal Court, 125 Cal. App. 3d 303, 178 Cal. Rptr. 47 (1981).

[11] See also Cal. Civ. Proc. Code § 1685 (referring to contempt under the heading "Terms and conditions to assure obligor's compliance"); Cal. Civ. Proc. Code § 1219 (governing "imprisonment to compel performance of act"). But see Cal. Civ. Proc. Code § 1218 (authorizing "punishment" for contempt in the form of a fine not exceeding $500 or imprisonment not exceeding five days).

than one to vindicate the authority of the court by inflicting punishment." *Warner* v. *Superior Court*, 126 Cal. App. 2d 821, 273 P.2d 89, 91 (1954).

The contempt proceeding in this case was initiated on the petition of the respondent's former wife (J.A. 3-6) and was obviously for the purpose of benefiting her and her children.[12] The caption of the proceeding suggests that it was viewed as a continuation of the original dissolution proceeding in which custody and support were awarded. The nature of the sentence imposed indicates that the trial court's purpose was to compel compliance with its original order rather than to punish respondent for past disobedience. The court suspended execution of the sentence and placed respondent on three years' informal probation *on the condition* that he make the payments required under the order. J.A. 36, 40.[13] The court cautioned respondent to keep current on his payments, including arrearages on a new schedule set in light of respondent's financial situation at the time of the hearing, and to remember that "we've got 25 days hanging over your head." J.A. 38. We understand that such conditional sentences are the rule in California child support enforcement proceedings.[14]

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[12] Although the district attorney handled this case, pursuant to URESA procedures (see page 4 and note 2, *supra*), it is not uncommon for the custodial spouse to pursue such contempt proceedings through privately retained counsel.

[13] The California courts have recognized that a conditional sentence of this type renders a proceeding civil rather than criminal in nature. In People v. Derner, 182 Cal. App. 3d 588, 227 Cal. Rptr. 344, 346 (1986), the court held in rejecting a double jeopardy claim that a contempt proceeding was civil in nature where the defendant was sentenced to five days' imprisonment and a $1,000 fine, but execution of the sentence was suspended for one year on the condition that the defendant comply with all laws and family court orders during that period.

[14] It is unclear from the record in this case whether an adjudication of guilt in this proceeding would have appeared on respondent's criminal record. Cal. Penal Code § 11107 requires sheriffs and police chiefs to furnish to the State Department of Justice reports concerning misdemeanors and felonies. A contempt adjudication under Cal. Civ. Proc. Code § 1209 is neither a misdemeanor nor a felony. We understand that in order for the adjudication to be recorded as a misdemeanor a contempt proceeding must be brought under Cal. Penal Code § 166.

The evident purpose of the proceeding in this case—to compel respondent to make the child support payments due under an existing court order—and the conditional nature of the sentence imposed by the trial court conclusively establish the civil nature of the proceeding. The fact that California courts may label the proceeding "quasi-criminal" doe not change its fundamental nature for federal due process purposes. See *Shillitani* v. *United States*, 384 U.S. at 365, 369-70. Nor is the scope of the protections required as a matter of federal due process affected by California's decision to afford all contempt citees many of the procedural protections to which criminal defendants are entitled. See, *e.g.*, *Allen* v. *Illinois*, 106 S. Ct. 2988, 2993 (1986); *Addington* v. *Texas*, 441 U.S. 418, 430-31 (1979).[15]

2. The analysis of the court below is grounded entirely on its premise that the proceeding in this case was criminal in nature and that this Court's precedents concerning the constitutionality of mandatory presumptions in criminal cases were therefore applicable. Once it is

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[15] We note that the California courts' decision to require use of the reasonable doubt standard in contempt proceedings appears to invite disregard of court orders. At an initial proceeding to obtain a child support order the plaintiff is required to show the defendant's ability to comply only by a preponderance of the evidence in order to obtain relief. See Cal. Evid. Code § 115. Under the California decisions, if the defendant elects not to comply with the court's order the plaintiff apparently cannot obtain judicial assistance in enforcing the initial order except on a showing of ability to pay under a much higher standard of proof. This discrepancy in the evidentiary standards applicable to a key issue surely frustrates the enforcement of judicial orders.

recognized that the proceeding in this case is fundamentally civil in nature, the court's analysis cannot stand.

We do not suggest that because of the civil nature of the proceeding in this case there are no applicable due process constraints. As the court below noted, Cal. Civ. Proc. Code § 1209.5 has the effect of creating a presumption of the citee's ability to pay. That presumption is rebuttable. Cal. Evid. Code § 602.[16] Under this Court's decisions, use of a rebuttable evidentiary presumption in a civil case is consistent with federal due process requirements if there is "some rational connection between the fact proved and the ultimate fact presumed." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K.C. R. Co.* v. *Turnipseed* 219 U.S. 35, 43 (1910)); see also, *e.g.*, *Vance* v. *Terrazas*, 444 U.S. 252, 269 (1980); *Adler* v. *Board of Education*, 342 U.S. 485, 494-96 (1952).

The presumption of ability to pay that results from application of section 1209.5 clearly meets this standard. Under that section, the facts that must be proved are the existence of a valid support order, notice to the noncustodial parent of the order, and his noncompliance. In issuing a support order a court must find on the basis of the evidence before it that the noncustodial parent is likely to be able to pay support in the ordered amount.[17]

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[16] It appears that the effect of section 1209.5 is to place on the noncustodial parent the burden of going forward with evidence, not the burden of proof. See Lyons v. Superior Court, 75 Cal. App. 3d 829, 838, 142 Cal. Rptr. 449, 452 (1977); Oliver v. Superior Court, 197 Cal. App. 2d 237, 17 Cal. Rptr. 474, 476-77 (1962). But see Application of Lawatch, 189 Cal. App. 2d 646, 11 Cal. Rptr. 419, 420 (1961).

[17] Cal. Civ. Code § 4700(a) provides that at the request of either party the court "shall make appropriate findings with respect to the circumstances on which the order for the support of a minor child is based." In applying that provision, courts must make findings concerning the noncustodial parent's ability to pay. See, *e.g.*, In re Marriage of Epstein, 24 Cal. 3d 87, 154 Cal. Rptr. 413, 421-22 & n.13, 592 P.2d 1165 (1979); In re Marriage of Chala, 92 Cal. App. 3d 996, 155 Cal. Rptr. 605, 606 (1979).

While it is always possible that the financial circumstances of the noncustodial parent will change, it is reasonable to infer from the initial finding that he remains capable of paying support at the ordered rate. It is consistent with "the generality of . . . experience," *Mobile, J. & K.C. R. Co.* v. *Turnipseed*, 219 U.S. at 42, that most persons will be able to maintain or increase their level of income as time passes; abrupt reverses of fortune are the exception, not the rule. That inference is especially reasonable in the case of noncustodial divorced parents, because studies show that the standard of living of such parents typically improves substantially following divorce.[18]

Moreover, a parent whose financial circumstances change may always seek a modification of the support order. If the parent has not sought and obtained such a modification, it is reasonable to presume that he continues to be able to make the payments required under the order. See *Martin* v. *Superior Court*, 17 Cal. App. 3d 412, 414-16, 95 Cal. Rptr. 110, 111-12 (1971) (concluding that section 1209.5 constituted a rational presumption because "[f]rom a finding of ability to pay at the time of the order and the failure to seek its modification, inferences may reasonably be drawn that an ability to meet the ordered payments continues").

B. This Court Has Recognized The Appropriateness Of Requiring The Citee In A Civil Contempt Proceeding To Produce Evidence Of Inability To Comply With A Judicial Order

In evaluating the constitutionality of the California legislature's approach to proof in child support enforcement proceedings, it is important to note that this Court has previously recognized the appropriateness of virtually identical procedures. On several occasions the Court

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[18] See page 23, note 21, *infra*.

has implicitly approved the requirement that the citee come forward with evidence of inability to comply with a judicial order in order to avoid being found in civil contempt.[19]

In *Oriel* v. *Russell*, 278 U.S. 358 (1929), the Court held that a citee in a civil contempt proceeding could not collaterally attack a turnover order on the ground that he did not have control of books and papers at the time the order was made. In affirming judgments of contempt, the Court stated that "the contemnors had ample opportunity in the original hearing to be heard as to the fact of concealment, *and in the motion for the contempt* to show their inability to comply with the turnover order. They did not succeed in meeting the burden which was necessarily theirs in each case . . . ." *Id.* at 366 (emphasis added). The Court in *Oriel* noted that the rules of evidence applicable to contempt cases involving coercive measures to secure compliance with alimony decrees were similar to those laid down by the Court for bankruptcy. *Id.* at 364-65.

In *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), the Court vacated a judgment of civil contempt where the court of appeals had stated that it knew the petitioner was unable to comply with a turnover order. The Court noted that a bankrupt confronted with a turnover order

> is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evi-

[19] Placing the burden of showing inability to comply on the citee in a civil contempt proceeding appears to be the general practice in the federal courts and in most states. See cases cited by the petitioner at Pet. 10-11 n.5.

> dence or by his own denials which the court finds incredible in context.

Id. at 75-76 (footnote omitted). See also *id.* at 84 (Frankfurter, J., dissenting) ("The right to be relieved from obeying the turnover order by sustaining the burden of inability to perform . . . has never been disputed.").

More recently, the Court's decision in *United States* v. *Rylander*, 460 U.S. 752 (1983), strongly suggests that there is no constitutional objection to requiring the citee in a civil contempt proceeding to produce evidence of inability to comply. In that case the Court rejected Rylander's claim that the government should bear the burden of producing evidence that he was able to comply with a court order for the production of documents. The Court recognized that a defendant could defend against a contempt charge by asserting a present inability to comply with the court's order, but noted that "[i]t is settled . . . that in raising this defense, the defendant has a burden of production." *Id.* at 757 (citations omitted). Rylander contended that a defendant should be freed from the burden of producing evidence of inability to comply when he asserts the Fifth Amendment privilege against self-incrimination. The Court rejected that argument, noting that the original court order created a "presumption of continuing possession," that the defendant was required to come forward with evidence in support of any claim of inability to comply, and that "the claim of privilege is not a substitute for relevant evidence." *Id.* at 761.

Oriel, *Maggio*, and *Rylander* and the other cases cited therein suggest that there has never been any real doubt about the appropriateness of placing on the citee in a civil contempt proceeding the burden of producing evidence of inability to comply with a court order. Moreover, the Court in *Rylander* found no constitutional infirmity in a requirement that the citee produce evidence of inability to comply, even in the face of an invocation

of the Fifth Amendment privilege against self-incrimination. *A fortiori* there can be no constitutional barrier to imposing such a burden on the respondent in this case, who does not invoke any testimonial privilege.

C. Balancing Of The Interests Affected By Allocation Of The Evidentiary Burden In A Child Support Enforcement Proceeding Confirms The Conclusion That Requiring A Noncustodial Parent To Produce Evidence Of Inability To Pay Is Consistent With Due Process Requirements

Even if the Court were to disregard the well-established case law concerning civil contempt and to undertake in this case a *de novo* consideration of applicable due process requirements, there would be no constitutional objection to the manner in which the California legislature has allocated the evidentiary burden in child support enforcement proceedings. The requirements of due process depend on a balancing of interests affected by the action at issue. See *Superintendent* v. *Hill*, 472 U.S. 445, 454 (1985); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). Balancing of the interests at stake in a child support enforcement proceeding indicates that there are strong reasons for requiring the noncustodial parent, rather than the custodial parent, to produce evidence relating to ability to make child support payments.

The interests of the noncustodial parent are relatively weak. As we explained in part A above, a child support enforcement proceeding is remedial in nature, not punitive. At this stage, the noncustodial parent does not face an accusation of criminal conduct. It appears that an adjudication of contempt that is not made specifically pursuant to the criminal contempt statute, Cal. Penal Code § 166, does not appear on a contemnor's criminal record. See pages 14-15, note 14, *supra*. In any event, a noncustodial parent who is found in contempt because of his failure to make child support payments does not

suffer the stigma associated with a criminal conviction. Indeed, it is unfortunate but true that in our society a noncustodial parent's failure to make child support payments is often regarded as far less reprehensible than his failure to make payments on his car.

There is no significant risk that a noncustodial parent will be erroneously found to be in contempt if he must bear the burden of producing evidence of his inability to pay. When the support order was originally entered, a court determined on the basis of available evidence (including evidence presented by the noncustodial parent) that there was reason to impose the support obligation and to believe that the noncustodial parent would be able to make payments in the future. As we showed in Part A above, the original adjudication of ability to pay and the noncustodial parent's failure to obtain a modification of that order present a rational basis for concluding that the ability to pay continues to exist.

If the noncustodial parent's financial condition in fact has deteriorated, the presumption established by the California legislature in effect requires him to document that change in order to avoid an adjudication of contempt. But that requirement is hardly burdensome. The practice of retaining financial records (*e.g.*, bank account documentation or pay records) is an activity in which most people engage in the normal course of their affairs. Even if the noncustodial parent does not keep such documentation he can offer oral testimony about his financial circumstances. The noncustodial parent will almost always have access to information about his own ability to pay; indeed, he is the person who is in the best position to provide information about his income, expenses and assets.

A noncustodial parent receives ample warning of the need to keep records. The issuance of the original support order should alert him to the need either to comply or to document reasons for noncompliance. The noncus-

todial parent may even receive explicit warnings of the need to keep records. In this case, after respondent's initial failure to pay, the court modified the order to decrease the amount of support he was required to pay. The modification order on its face required respondent to provide his business financial records at a future hearing. J.A. 16.

Moreover, the burden imposed by the presumption at issue here appears to be relatively light. The presumption apparently imposes a burden of production, not a burden of proof. See page 16, note 16, *supra*. Once the noncustodial parent submits evidence of his inability to pay, the court must conclude that, considering both the presumption and the evidence submitted by both parties, there is substantial evidence to support a judgment of contempt. *Oliver* v. *Superior Court*, 197 Cal. App. 2d 237, 17 Cal. Rptr. 474, 477 (1961). In this case the court concluded on the basis of respondent's oral testimony and incomplete business records that he had overcome the presumption of ability to pay as to four of the nine months at issue.

Of course, a noncustodial parent who is unable to pay, but who fails to produce any persuasive evidence of his financial circumstances, faces the prospect of incarceration. However, the term for which he may be incarcerated is limited to five days for each act of contempt (Cal. Civ. Proc. Code § 1218)—a sanction the California Supreme Court has termed "relatively petty." *Mitchell* v. *Superior Court*, 43 Cal. 3d 107, 232 Cal. Rptr. 900, 905, 729 P.2d 212 (1987), rehearing granted (Mar. 26, 1987). Moreover, a noncustodial parent who faces the prospect of jail and who lacks financial resources of his own may be able to borrow money to meet his obligation, thereby avoiding incarceration and giving him time to improve his financial situation. Indeed, in most cases, it appears that noncustodial parents who are sentenced to

jail manage to locate the necessary funds and escape imprisonment.[20]

Most importantly, a noncustodial parent can avoid a contempt proceeding altogether by seeking a timely modification of the court's order. Here the support order explicitly advised respondent of his right to ask that the court "order the child support payments be decreased or eliminated entirely." J.A. 16. See also Cal. Civ. Code § 4700(a). In addition, respondent apparently had several opportunities to seek such modification. See J.A. 34. It is hardly unduly burdensome to require that a noncustodial parent who finds that he is unable to make court-ordered payments take the step of returning to the court to seek a decrease in his obligation.

On the other side of the equation, the interests of the custodial parent and her children in a child support enforcement proceeding are strong. For many mothers and children, support payments mean the difference between a modest standard of living and outright poverty. Studies have shown that, following divorce, men typically experience an increase in their standard of living, but women and children experience a drastic decline.[21] The

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[20] A random sample of West Palm Beach contempt orders indicated that of 60 commitment orders issued in a three-month period, all but two of the 54 fathers located paid, rather than face a jail term. Bruch & Wikler, *The Economic Consequences*, 36 Juvenile & Family Courts J. 5, 22 (1985).

[21] Ninety-five percent of the parents who are ordered to make child support payments are men. L. Weitzman, *The Divorce Revolution* 269 (1985). A University of Michigan study of 5000 American families found that, using an index of income in relation to needs, the post-divorce standard of living of men improved by 17%, while that of women declined by 29%. S. Hoffman & J. Holmes, *Husbands, Wives, and Divorce*, in Five Thousand American Families—Patterns of Economic Progress 24 (1976). A California study revealed even more dramatic differences. Using the same standard of living index, the California researchers found that, within the first year after divorce, men experienced a 42% increase in their standard of living, while women experienced a 73% decline. L. Weitzman, *The Divorce Revolution* 339 (1985).

divorced mother's earning capacity is typically much less than that of her ex-husband, due in part to lack of training and experience and in part to the continued disparity in men's and women's salaries even for the same work.[22] Moreover, in order to work, mothers must frequently incur significant expenses for child care.

For children, the consequences of their fathers' irresponsibility are serious.[23] Nonpayment of support entails not only a precipitous decline in their immediate economic well-being, but the deprivation of educational and other opportunities. These children will thus be less well prepared to break the cycle of poverty when they become adults. The decline in a child's standard of living following divorce frequently also has dislocating effects on the child's emotional and psychological health, as a reduced income forces the mother to move to a less expensive neighborhood with unfamiliar schools or childcare facilities, often at the same time that she herself must spend a greater amount of time away from the children in order to hold a job.[24] Thus, to the extent that noncustodial parents are able to pay but can avoid their support

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[22] In 1985, the median earnings of male full-time workers were $24,004, while those of female full-time workers were only $15,422. U.S. Dept. of Commerce, Bureau of the Census, *Money Income of Households, Families, and Persons in the United States: 1985*, Current Population Reports, Series P-60, No. 15 (1986).

[23] These serious consequences will affect a large percentage of the nation's children in coming years. Currently, more than 18 million children live with divorced or separated parents. U.S. Dept. of Health and Human Services, *History and Fundamentals of Child Support Enforcement* 1 (2d ed. 1986). In view of government estimates that at least half of all new marriages can be expected to end in divorce, *id.*, it is likely that many more children will be placed in this situation in the future. See H.R. Rep. No. 527, 98th Cong., 1st Sess. 30 (1983) (estimating that half of the children born in 1983 will live in a single-parent family before they reach age 18).

[24] See L. Weitzman, *The Divorce Revolution* 318-19 (1985).

obligations by declining to produce evidence of their financial circumstances, there will be serious detrimental effects on the welfare of the custodial parent and her children.

Placing the burden of producing evidence of ability to pay on the custodial parent in a child support enforcement proceeding would create very serious problems for her and her children. In most cases she will lack access to the noncustodial parent's financial and employment records. If such records exist, the custodial parent may face restrictions and delay in attempting to obtain them for use in a contempt proceeding. And where a noncustodial parent is self-employed and refrains from keeping financial records or readily verifiable assets or acts to conceal his income and assets, the custodial parent may have no way of proving his ability to pay. Thus, in many cases where the noncustodial parent is able to pay but chooses to remain silent, the custodial parent and her children will not receive the payments to which they are entitled under a valid judicial order.

In addition to the interests of these private parties, there is a strong societal interest in child support enforcement proceedings. Of course, states have a strong interest in promoting compliance with the orders of their courts. For the reasons we have suggested above, requiring the custodial parent to produce evidence of the noncustodial parent's ability to pay in many cases will leave the latter free to determine for himself whether or not to obey the court order—a result clearly at odds with the public interest. See *Walker* v. *Birmingham*, 388 U.S. 307, 320-31 (1967). The result of such a rule would be to undermine the functioning of the State's judicial system and ultimately to impair its usefulness as an efficient and workable means of resolving disputes.

In addition, there is a strong public interest in maximizing the effectiveness of child support enforcement.

Both state and federal governments have an interest in ensuring that parents support their children. The failure of enforcement efforts in this area has become a national scandal. In 1983, only half of custodial parents received the full amount of child support ordered; approximately 26% received some lesser amount, and 24% received nothing at all.[25] During the same year, the mean amount of annual child support ordered was $2,521, but the mean amount paid was only $1,779.[26] In a 1978 California study of support payments during the first year after divorce, only one-third of the women received the full amount due, while 43% received little or nothing.[27] Not one study has found a state or county in which even half of the fathers fully comply with support orders.[28] Nationwide, noncustodial fathers fail to pay over $4 billion in child support payments each year.[29] When fathers default on their child support obligations, state and federal governments must often pick up the tab. According to a Census Bureau study, 38% of divorced mothers without child support receive public assistance, compared with only 13% of those who receive some child support.[30]

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[25] U.S. Dept. of Commerce, Bureau of the Census, *Child Support and Alimony: 1983 (Supplemental Report)*, Current Population Reports, Series P-23, No. 148, at 1 (1986) [hereinafter *Child Support 1983*]; see also U.S. Dept. of Health and Human Services, *History and Fundamentals of Child Support Enforcement* 2 (2d ed. 1986).

[26] *Child Support 1983* at 10.

[27] L. Weitzman, *The Divorce Revolution* 283 (1985).

[28] *Id.* at 284.

[29] *Child Support Law Passed*, The Miami Herald, Aug. 9, 1984, at 4A (quoting Rep. Harold Ford).

[30] U.S. Dept. of Commerce, Bureau of the Census, *Divorce, Child Custody and Child Support*, Current Population Reports, Series P-23, No. 84, at 3-4 (1979).

Both Congress and the Executive Branch of the federal government have recognized the importance of enforcing child support orders. Congress provides funding to assist states in their child support enforcement efforts under Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 *et seq.* Several years ago Congress enacted the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, which strengthened the enforcement mechanisms available to states and to custodial parents. At that time Congress pointed to the seriousness of the problem caused by noncustodial parents' refusal to honor their child-support obligations. S. Rep. No. 387, 98th Cong., 2d Sess. 5-6, 42 (1984); H.R. Rep. No. 527, 98th Cong., 1st Sess. 30, 49 (1983). The Secretary of Health and Human Services, testifying during congressional hearings on this legislation, emphasized "the destitution, the desperation, and the simple human suffering of women and children who [are] not receiving child support payments legally owed them." *Child Support Enforcement Legislation: Hearings before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 34-35 (1983) (statement of Margaret M. Heckler).

It is clear that contempt proceedings can be an effective mechanism in forcing noncustodial parents to comply with child support orders. In a study of 28 Michigan counties, those counties with the highest rates of compliance also had the highest rates of contempt incarcerations.[31] Similar results were reported in West Palm Beach, Florida, where judges found that the most effective means of securing compliance was to sentence noncomplying fathers to jail, but to suspend the incarceration if they paid the arrearage.[32] Contempt proceedings are a particularly important means of enforcement in

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[31] D. Chambers, *Making Fathers Pay* 101 (1979).

[32] L. Weitzman, *The Divorce Revolution* 299 (1985).

the case of self-employed parents who do not have wages that can be garnished or readily identifiable assets that can be attached. The effectiveness of contempt proceedings as a method of enforcing child support obligations will be severely diminished if the decision below is allowed to stand.[33]

The interests of the noncustodial parent and her children and of society as a whole are clearly stronger than the interest of the noncustodial parent in this case. This Court should hold that the California legislature's rule of proof in child support enforcement proceedings is fully consistent with federal due process requirements.[34]

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[33] The court below ultimately construed section 1209.5 as authorizing a permissive inference of ability to pay for purposes of future cases. Pet. App. A10-A11. However, the court appears to have believed that such an inference would be proper only as to contempts that occur within a short time of the original order or as to cases in which the custodial parent is able to present some evidence of the noncustodial parent's ability to pay. Pet. App. A9, A11 & n.2. It is questionable whether judges would be willing to draw an inference of ability to pay in most cases, particularly where the custodial parent had been unable to unearth any direct evidence of the noncustodial parent's financial situation.

[34] If, contrary to our view, the Court should conclude that California's unusual approach to contempt proceedings required that the decision below be affirmed, it should make clear that the ruling does not in any way affect the validity of similar presumptions used in other states' child support enforcement proceedings, which more closely resemble traditional civil contempt proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

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